

COMMENTARIES
ON THE
TRANSFER OF PROPERTY ACT, 1882,
(ACT IV OF 1882)

AMENDED BY ACT III OF 1885,

BY

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H. H. S.

K. B.

30th April 1899.

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ABBREVIATIONS.

A. & E...	Adolphus and Ellis.
A. C.	Appellate Civil Jurisdiction.
Agra	Agra High Court Reports.
App. ...	...	...	Appendix.
App. Cas.	...	...	Law Reports, Appeal Case.
Atk. ...	...	...	Atkins.
B. & Ad.	...	...	Barnewall and Adolphus.
B. & Ald.	...	...	„ and Alderson.
B. & O.	...	...	„ and Cresswell.
B. & S.	...	...	Best and Smith.
Beav. ...	...	...	Beavan.
Beng. L. R.	...	...	Bengal Law Report.
Bing. ...	...	...	Bingham.
Bing. N. O.	...	...	Bingham's New Cases.
Bom. H. C.	...	...	Bombay High Court Report.
Brow. & Lush.	...	...	Browning and Lushington's Reports.
Cal. Rep.	...	...	Calcutta Law Reports.
Camp...	...	...	Campbell's Reports.
C. B. ...	...	...	Common Bench.
C. M. & R.	...	...	Crompton, Meeson and Roscoe.
C. & P.	...	...	Carrington and Payne.
C. P. D.	...	...	Law Reports, Common Pleas Division.
Ch. D. ...	...	...	Law Reports, Chancery Division.
Cowp. ...	...	...	Cowper.
D. & C.	...	...	Deacon and O'hitty.
De G. & J.	...	...	De Gex and Jones.
De G. & S.	...	...	De Gex and Smale.
De G. F. & J.	...	...	De Gex, Fisher and Jones.
De G. M. & G.	...	...	De Gex, Macnaghten and Gordon.
Dr. & War.	...	...	Drury and Warren's Reports.
Drew. ...	...	...	Drewry.
Drew. & S.	...	...	Drewry and Smale.
Durn. & E.	...	...	Durnford and East.
East ...	...	...	East's Reports.
E. & B.	...	...	Ellis and Blackburn.
E. B. & E.	...	...	Ellis, Blackburn and Ellis.
Esp. ...	...	...	Espinasse.
Exch. ...	...	...	Exchequer Reports.
Ex. D....	...	...	Law Reports, Exchequer Division.
F. B. ...	...	...	Full Bench.
Giff. ...	...	...	Giffard's Reports.
Harc ...	...	...	Hare's Reports.

H. & C.	...	...	Hurlstone and Coltman.
H. & N.	...	...	„ and Norman.
H. L. C.	...	...	House of Lords Cases.
H. Bl.	...	...	Henry Blackstone.
I. L. R., All.	...	...	Indian Law Reports, Allahabad Series.
I. L. R., Bom.	...	...	„ „ Bombay „
I. L. R., Cal.	...	...	„ „ Calcutta „
I. L. R., Mad.	...	...	„ „ Madras „
Ir.	...	...	Irish.
Ind. Jur.	...	...	Indian Jurist.
J. & H.	...	...	Johnson and Hemming's Reports.
Jur.	...	...	Jurist.
Kay & J.	...	...	Kay and Johnson.
Keen	...	...	Keen's Reports.
Leon.	...	...	Leonard's Reports.
L. J. Ch.	...	...	Law Journal, Chancery.
L. R. Ch.	...	...	Law Reports, Chancery Appeals.
L. R. C. P.	...	...	„ Common Pleas.
L. R. Eq.	...	...	„ Equity Cases.
L. R. Ex.	...	...	„ Exchequer.
L. R. H. L.	...	...	„ English and Irish Appeals.
L. R. I. A.	...	...	„ Indian Appeals.
L. R. Q. B.	...	...	„ Queen's Bench.
L. T.	...	...	Law Times.
M. & C.	...	...	Mylne and Craig.
M. & K.	...	...	„ and Keen.
M. & W.	...	...	Meeson and Welsby.
M. & S.	...	...	Maule and Selwyn.
Mad. H. C.	...	...	Madras High Court Reports.
McQ.	...	...	McQueen's House of Lords Cases.
Mac. & G.	...	...	Macnaghten and Gordon.
Mer.	...	...	Merivale.
Mont.	...	...	Montagu.
Mont. & Ayr.	...	...	Montagu and Ayrton.
Moo. I. A.	...	...	Moore's Indian Appeals.
Moo. P. C.	...	...	„ Privy Council Reports.
My. & Cr.	...	...	Mylne and Craig.
My. & K.	...	...	„ and Keen.
N. S.	...	...	New Series.
N. W. P.	...	...	North-West Provinces High Court Reports.
O. C.	...	...	Original Civil Jurisdiction.
P. D.	...	...	Probate Division.
P. Wms.	...	...	P. Williams.
Phill.	...	...	Phillips.
Q. B.	...	...	Queen's Bench Reports.
Q. B. D.	Law Reports, Queen's Bench Division.
R. & M.	Russell and Mylne.
R. R.	Revised Reports.

ABBREVIATIONS.

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Russ. Russell.
S. D. A. Sudder Dewany Adawlut.
Sch. & Lef. Schoales and Lefroy.
S. L. C. Smith's Leading Cases.
Sim. ...	...	... Simon.
Sm. & Giff. ...	...	... Smale and Giffard.
Stark. ...	...	... Starkie.
Sup. Vol. ...	...	... Supplementary Volume.
Sw. ...	...	... Swanston.
Taunt. ...	...	... Taunton.
T. R. ...	...	... Term Reports.
Vaugh. ...	...	... Vaughan's Reports.
Ves. ...	...	... Vesey.
Ves. & B. ...	...	... Vesey and Beames' Reports.
W. N. ...	...	... Weekly Notes.
W. R. ...	...	... Sutherland's Weekly Reporter.
W & T. L. C. ...	...	... White and Tudor's Leading Cases.
Y. & C. C. C. Younge and Collyer's Chancery Cases.
Y. & C. Ex. Younge and Collyer's Exchequer Reports.

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INTRODUCTION.

As a general proposition it may be affirmed that every tangible thing which possesses any value may be appropriated by an owner, and hence may be called property and made the subject of a transaction between him and other persons. The person who so deals with the thing is said to alienate it or transfer it, or, according to the nature of the thing, to convey or assign it. The thing itself, thus called 'property,' is not necessarily a tangible object, for incorporeal or intangible things are also capable of being owned and transferred. And the Act relates to such things as well as to physical objects in the shape of land and goods (section 8). It is with those latter, however, described as immoveable and moveable property and with the transfer of interests in them, that the Act is chiefly concerned. The Act is generally consistent in using the term 'property' in that sense, and not in the sense of ownership or dominion in which it is used elsewhere, *e.g.*, in the Contract Act, section 78.

In order that a transfer of property may take place, there must be in existence a thing capable of being transferred and at least two persons, who by mutual consent in dealing with the thing take the respective parts of grantor and recipient. There are some obvious exceptions from the rule that physical objects may be appropriated; for instance, the water of a stream, or the air in its natural state. Of such things not being capable of appropriation there can be no transfer—they are not property. There are again things which, though in a sense they may be called property, are excepted from the general rule in favour of alienability. Section 6 specifies such exceptions. The thing must be in actual existence when the transfer of it takes effect. There may be a bargain and contract about it beforehand, but plainly there can be no transfer of a non-existing thing (section 124).

There must be at least two persons, the transferor and the transferee, of whom both must be living persons at the date of the transfer. A corporation is in the view of law a person and therefore, while a man cannot sell property to himself, he can sell it to a corporate body of which he

is a member. (*Farrar v. Farrars, Limited*, 40 Ch. D., p. 409; *John Foster & Sons v. Commissioners of Inland Revenue*, [1894] 1 Q. B., p. 516). Wills do not come within the provisions of the Act, for by a will a man declares his intentions with regard to his property which he desires to have carried into effect after his death. On the death of the testator only the will operates. Again the transferee, not being a corporation or other legal person, must be a living person. Property cannot be sold or otherwise transferred to an inanimate object. And it is expressly provided that, if the donee dies before acceptance of the thing given, the gift is void (section 122).

On the part of the transferor there must further be capacity to contract. Persons who, whether from minority or other disabling cause, are devoid of such capacity, cannot make valid transfers of property. While such is the general provision relating to the party who necessarily takes the onerous or active part in the transaction, there is no similar provision with regard to the recipient of property transferred. The recipient of a gift must be a person endowed with capacity for rights, but he need not be possessed of the capacity for legal action. An infant may accept a gift. If however the transaction is such as to impose any obligation on the donee, it at once becomes essential that he should be a person competent to contract (section 127). The Act makes no general provision for the cases in which competency on the part of the transferee is required, but it is clear that, in all cases in which the transaction is onerous to the transferee, the general rule applicable to contracts must prevail and the transfer is not absolutely binding upon him. So of infants it is said that they are capable of purchasing *sub modo*. On obtaining their full age "they may bind themselves by agreeing to the purchase; or may waive the purchase without alleging any cause for so doing." (*Sugden's Vendor's and Purchasers*, p. 686.) The same rule holds good generally with regard to contracts made by minors or other incompetent persons, although no place has been found for it in the Contract Act.

The two persons must both agree, the one to transfer, the other to accept, the agreed thing. Error as to the identity of the thing sold excludes the possibility of consent and therefore makes the sale void. In the case of sales and transactions other than gifts there can be no doubt that

the assent of the transferee as well as that of the transferor is required. The case of gift is really no exception, and section 122 makes it clear that there must be acceptance by the donee.

According to the terminology adopted by the Contract Act, a contract involves a promise enforceable by law. The term 'contract' is not applicable to transactions other than those importing obligations.

§ 2. Contract and transfer.

A transfer of property does not necessarily involve a contract in that sense of the word. In the case of a gift no promise is made by the donor or donee and no obligation is created. Yet, as has been seen, the transaction so far resembles a contract that there are the two consenting minds both directed towards the same object. And the same reasons, which vitiate a consent and make a contract voidable under the Contract Act, make a gift revocable under the Transfer of Property Act (section 126). While there is thus a close relation between gift and contract, all other transactions relating to property necessarily involve an obligatory contract.

Sale, mortgage, or pledge, lease, and bailment, may alike be classed as contracts, because in each case there is a contract which leads up to the transfer, and in the result contractual relations are created between the parties. No rational distinction can be founded on the difference in the character of the property to which the transaction relates. A sale is none the less a contract because it is a sale of land. It follows that, if the chapters on sale and bailment were rightly placed in the Contract Act, the chapters on sale, mortgage, and lease in the Transfer of Property Act ought also to have been placed in the former Act. And so by section 4 of the Act it is declared that "the chapters and sections of the Act which relate to contracts shall be taken as part of the Indian Contract Act." As a matter of fact a large portion of the rules contained in the Act should properly be placed under the head of contract. The last chapter relates almost entirely to the transfer of obligations which in a secondary sense only can be regarded as property. There remains only a part directly concerned with property, the modes of transferring it, and the conditions under which it may be transferred.

As to the nature of ownership and the interests in property which may be the subject of transfer, little information is to be found in the Act. The right

§ 3. Ownership.

of the person entitled to transferable property is described as ownership, and a sale or exchange of such property is described as a transfer of ownership. And similar language is used in the chapter on sale of goods in the Contract Act, section 77: In the section concerning gift, section 122, there is no mention of ownership, but gift is said to be simply the transfer of property. (See too sections 8, 86, 92). The change of language is probably unintentional.

Ownership or property, when the latter term is used to denote a legal concept and not a thing, is described by Austin as "a right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration," Vol. II, p. 817. Normally and in the absence of special restrictions, the ownership of a thing involves the possibility of enjoying it and dealing with it in all possible ways. It still subsists notwithstanding that the powers thus connoted by ownership are temporarily withdrawn. A mortgage or lease of property does not deprive the person who grants it of his ownership. The creation of a trust leaves the ownership in the trustee while the beneficial interest is vested in another. (Trusts Act, section 3.) On the other hand, the right acquired by the mortgagee or the lessee is not ownership, because in its nature it is restricted. That is the characteristic of a right *in re alienâ* as opposed to ownership. The very fact that such a right as a mortgage-right subsists, implies that another person is owner; for the same person can no more be possessed of both these rights at the same time than can the same person be creditor as well as debtor in respect of the same obligation. When the greater and the lesser rights are united in one person, a merger or confusion takes place (sections 101, 111 (d); compare section 46, Easements Act).

These restricted rights are in the Act called interests. It is an interest which a mortgagee acquires (section 58).

Interests.

The lessee is said to have an interest in the property (section 108 (3)). In the sections (10th to 31th) prescribing the conditions under which transfers may be effected, the right created by the transfer is called an interest. In section 40 an interest in property or easement thereon is distinguished from the right arising from an obligation annexed to the ownership of property. A right may have reference to property and still not constitute an interest in it. And so a person entitled to receive

maintenance from the profits of immoveable property is not said to have an interest in it (section 39); and it is expressly declared that no interest is created in property by the mere contract for sale of it. (See however the use of the term 'interest' in Trusts Act, section 3.)

Ownership and interests, not amounting to ownership, are alike known by the general name of real rights. They have this in common that they all imply a certain relation to property and are impersonal in character, the correlative duty being imposed, not upon any determinate individual, but on other persons generally. They are in their nature permanent or capable of being permanent so far as property itself is permanent. In these and other respects they differ from the right which a contract gives, for a contract can bind determinate persons only and serves no more than a temporary purpose. Nevertheless there are exceptions. Section 40 shows how a right or obligation, not amounting to an interest, may be enforced against strangers who have taken with notice or gratuitously. (Compare Trusts Act, sections 63, 64 and 91.)

In respect of forms of transfer it may be said generally, that there must be either delivery or the execution of a written instrument. When the property being immoveable is not tangible and therefore delivery is not possible, a sale, exchange, or mortgage can only be effected by an instrument which must be registered. A registered instrument is further always required for the gift of immoveable property, as also for the sale or mortgage of such property exceeding Rs. 100 in value. In addition the instrument of gift or mortgage must be attested by at least two witnesses. In the case of leases the necessity for a registered instrument depends on the terms of the letting (section 107).

Subject to the provisions contained in section six and also to the rule regarding alienations made *pendente lite* (section 52), the owner of property, or of any interest in it, may deal with it by way of transfer in any manner consistent with the nature of the interest and with the rules hereafter mentioned. Sale is described as the transfer of ownership, but a lesser interest such as mortgagee's or a lessee's (section 108 (j)), may also be sold, as too it may be made the subject

§ 4. Forms.

§ 5. Property generally alienable.

of a gift or a mortgage. Again other limited interests, *e.g.*, that of a tenant-for-life, may be dealt with in the same way. The general rule is that, in the absence of an intention to the contrary, a transfer of property must be taken to, pass all the interest, whatever it may be, of the transferor (sections 8, 44). If the transferor possesses no interest, the transfer avails nothing. A person not possessed of any legal interest in a particular property is said to have no title to it, and as a general rule he cannot convey to another what he has not got himself. (See Contract Act, section 108.) Section seven presupposes the existence of a title or at least of a power of disposition, for a man may have a power of dealing with property without having any interest in it. (Section 8. *In re Cardross's Settlement*, 7 Ch. D., 728.)

The expression 'title' is used in more senses than one (Austin, Vol. II, 1010). It is used as equivalent to right, as for instance, when one man is said to be predecessor in title of another. It is also used to denote the means whereby the right to property is acquired. In this sense a vendor's title consists of the series of processes, whether acts of parties or acts of law, which have led to his acquisition of the right of ownership. Ownership may be acquired immediately by occupation, the thing having previously been ownerless; but in practice derivative acquisition only need be considered. To show a valid right to the property, a good title as it is called, the vendor may have to establish the right of a succession of predecessors and the validity of the several conveyances made by them. Or without proving any transfers by acts of parties he may establish his title by proof of the facts necessary to make the law of limitation or that of inheritance apply. Although proof of title may be much facilitated by the law of limitation and registration, cases may still arise in which absolute proof is wanting. Such absolute certainty is not however required, for a purchaser may be compelled to take a title free from reasonable doubt. (Specific Relief Act, section 25 (b).)

No person being able to convey what he himself has not got, it follows that if an owner has sold his property to one person, he cannot afterwards convey it in any manner to another. There is nothing left upon which the later conveyance can take effect. Only when an interest remains in him after the first conveyance, can the later conveyance have any operation. Successive transfers of

interests in the same property, when they operate at all, operate in the order of time in which they are made (section 48). From this general rule an exception is made by section 78. The mortgagee earlier in point of time may owing to his conduct lose his priority and be postponed to a later mortgagee. And although ordinarily a purchaser acquires no title except from a person himself possessed of a title, there are exceptional cases in which, notwithstanding the want of title, the transfer may prove effectual. On the principle of estoppel the real owner of property, which another person, acting with his consent as ostensible owner, has transferred to a third person for good consideration, is not permitted to question the transfer as against the transferee who has acted in good faith, after taking reasonable care to ascertain that the ostensible owner had power to make the transfer (section 41). And section forty-three provides for the case where at the time of the transfer the transferor has no title, but subsequently acquires one. That provision also is founded on the principle of estoppel. Again, in the case provided for in section 35 property to which the transferor has no title may, on the election of the transferee to confirm the transfer, be validly transferred to a third person. The real owner cannot at the same time impugn the transaction so far as it affects his own property and adopt it so far as it confers a benefit upon him. In addition to these provisions concerning transferees from persons whose title is defective, there is further provision made in favour of those who by honest mistake pay money on account of rents and profits to the wrong person (section 50) and also of those who, on the faith of the title which they believe they have acquired, incur expense on account of improvements of the property and subsequently are deprived of it by the real owner (section 51).

The power of the owner of property in dealing with it by way of transfer is limited by the provisions contained in sections 10 to 34. Generally he cannot prevent his transferee from exercising like powers of disposition or from enjoying and using the property as he pleases. An exception derived from English law is made in the case of a married woman in whose favour a settlement of property for her separate use is made. She may be restrained from alienating it. And when the transferee is a lessee, a condition is not illegal because it restrains him in disposing of his interest. Again, with

§ 6. Restrictions on alienation.

regard to the enjoyment of property, a restraint may be put upon a purchaser when it is required for the more convenient enjoyment of a neighbouring piece of land. In this as in the last case the restraint being imposed for the advantage of the transferor cannot be deemed arbitrary.

A transfer of property may be qualified by being made conditional, by being made to take effect only at some future time, or by being subjected to an obligation. A contract or disposition of property is said to be conditional when the operation of the transaction, which is otherwise complete, is made to depend on some collateral and uncertain circumstance. See section 31, Contract Act. The difference between a transfer thus qualified by a condition and a transfer qualified in the matter of time only is marked in sections 19 and 21. The circumstance that the transfer is so made as to take effect only on the expiration of a given time or on the happening of a given event does not make the transfer conditional, unless the event is an uncertain one which may or may not happen.

The qualification of a transfer in respect of time is legal, provided it does not transgress the rules laid down in sections 10 and 13 to 18. (Compare the similar provisions in Part XII of the Succession Act.) The interest taken by such a transfer is called a vested one as distinguished from the contingent interest the accrual of which is made to depend on the happening of an uncertain event. The vesting of the interest is suspended as long as the condition remains unfulfilled, and hence the condition is called suspensive or precedent. The rules regarding such conditions are contained in sections 21 to 27. The sections that follow (sections 28 to 34) relate to conditions which, instead of suspending the acquisition of the interest, operate to extinguish it after it has been acquired and are therefore called resolute or subsequent. (See also sections 10 and 11.) By means of a condition the owner of property may so dispose of it as to make it vest on the occurring of specified uncertain events in several persons successively. But the general power of dealing with property is limited by positive rules. Certain conditions are prohibited by law and therefore have no legal operation (sections 10, 12, 25, 32). A gift which is to take effect on the fulfilment of an illegal condition is itself void and of no effect; and similarly with conditions subsequent, they cannot, unless they are legal

qualify the interest of the donee. Again, there are rules limiting the creation of interests in the future. The ownership of property cannot be kept in suspense for an indefinite time. At the utmost the interval, during which the creation of the interest or the vesting of the property may be delayed, cannot exceed the life-time of persons living at the date of the transfer and the minority of persons who shall be living on the extinction of such life-time. Nor can the owner of property grant any interest other than his entire interest in the property in favour of a person not living at the date of the grant. (Sections 13 and 14 and compare Succession Act, sections 100 and 101.) These provisions in favour of the free alienability of property do not apply to gifts made for charitable purposes (section 17, see p. 58).

A third way in which the owner of property may qualify his disposition of it, is by attaching an obligation to the ownership. An obligation may be so imposed even in the case of a gift (section 127). Provision is made in section 37 for the apportionment of the benefit of such an obligation in the event of the division of the property to which it relates. Section 36 provides for the apportionment of rents and other income as between the transferor and transferee. (Compare section 8, note 6, and section 109.) The burden of the obligation is not to be enhanced by the severance of the property or the transfer of it to a third person.

The Act makes special provision for two cases in which a transfer otherwise valid, but made with intent to defeat the rights of third parties, is not allowed to operate against them (sections 39 and 53). The protection thus given to those parties, in the one case parties entitled to maintenance, in the other to creditors, purchasers, and others, does not avail them against purchasers in good faith and for consideration.

Sale and exchange may be taken together because in their

§ 7. Sale and Ex- nature they are the same. In both there is a
change. contract between two persons, which does not involve any continuing relation but is fulfilled when the mutual exchange of properties has taken place. Sale is merely exchange with a difference, the difference being that the seller bargains for, and the buyer has to pay, money, and not any other thing in exchange for the thing sold. Generally, the rights and duties are the same whether the property is transferred by way of barter or

by way of sale (section 120). Partition which may be described as a contract by means of which two or more joint-tenants or tenants-in-common divide the property in severalty, each taking a distinct part, is not dealt with in the Act.

Property in any form, or any interest in it, may be the subject of sale, although in this Act, as in the Contract Act, the transfer of ownership only is mentioned.

The contract has to be distinguished from the conveyance or transfer to which it leads and on the execution of which its main purpose is fulfilled. By the mere contract ownership is not passed; for that, either a registered instrument duly executed, or delivery of possession is requisite (section 54). The benefits of ownership are enjoyed and the risks and burdens of it borne by the buyer only from the date of the execution of the conveyance, (section 55 (1) (g), (4) (a), (5) (c), 6 (a); and compare section 86, Contract Act). The obligations on the part of the seller relate to the property itself, and the doing of everything necessary to complete the title of the buyer and place him in possession. The buyer is entitled to be put in a position to know the nature of the property he is buying and the nature of the title, section 55 (1) (a) (b) (c); he is entitled to have due care taken of it between the date of the contract and the date of delivery (e); he is further entitled to hold the seller responsible if in fact he does not possess the interest he professes to transfer (section 55 (2)). This latter obligation may be compared with the warranty of title given by section 109 of the Contract Act. It is not an obligation of a continuing character such as that which arises from a covenant for quiet enjoyment. (Compare section 108 (c)). Of the reciprocal promises of which the contract consists, the principal on the seller's part is the execution of the conveyance when by that means the ownership is to be transferred. That promise has to be performed on payment of the price. (Section 55 (1) d; compare section 51, Contract Act.) And finally possession has to be delivered, at least such possession as the nature of the property admits. (Section 55 (1), (f); compare section 108 (b)).

When such possession has been taken and the price has been paid, the relation between the parties is determined subject only to any question about the title; the obligation regarding it subsists for the benefit of the buyer and his transferees. If possession has not been taken and the price has been paid, the buyer is entitled to

a charge on the property for the amount so paid. On the other hand if possession has been taken and the price has not been paid, the seller is protected by a similar charge. This charge is not strictly in the nature of a real right, for it is available only against third persons who have had notice of it. Otherwise the rights of the parties under the contract of sale are purely of a contractual character. According to the circumstances, either party may bring a suit for specific performance or for rescission of the contract, or again a suit for the purchase-money or for damages.

A mortgage cannot, like a sale or a lease, be said to partake of

§ 8. Mortgage.

the nature of an exchange. The main object of the transaction is the loan which is required by the mortgagor, and it is only because the lender is not satisfied with the borrower's personal credit that he requires to have transferred to him any interest in his property. The interest so taken he holds merely as security for the debt. His right is of an accessory character and passes with the debt (section 8) or on its extinguishment is determined. On the other hand the debt subsists independently of the mortgage except in the case in which the mortgage is concluded by a decree for foreclosure. In that case the debt is deemed to be discharged, whereas in other cases it may still be recoverable from the mortgagor personally (section 87).

A mortgage is effected in several ways. Four principal forms are specially described. Combinations of these forms are not uncommon, and the Act leaves room for other transactions of an anomalous character (section 98). As in the case of sale, registration is generally required (section 59).

The rights and liabilities of the parties vary according to the terms of the particular transaction and more especially according to the nature of the interest taken by the mortgagee. The remedy which the mortgagor possesses is always by suit for redemption; for the mortgagee there are various ways of satisfying his claim. A distinction has to be observed between the mortgage which does, and the mortgage which does not, import possession of the property; in mortgages of the latter class, the remedy may be by suit for sale or for foreclosure, or again the mortgagee may be entitled to a power of sale independently of any suit. Similarly, as to the relations of the parties while the mortgage subsists, they vary

according to the nature of the mortgage, and the principal difference arises from the fact that the mortgagee may or may not be put into possession. The rights of the parties prior to, and during the continuance of, the mortgage-relation are stated in sections 65, 66, 70, 71, 72, 73, 76, 77. Whether or not the mortgagee takes possession, it concerns him, as it concerns any purchaser, that he really secures the interest which the mortgagor purports to convey to him. There is therefore precisely the same covenant for title (section 65 (a) (b) and therewith section 68). In either case also the mortgagee is entitled to accessions to the original property or to the proceeds of it when sold for arrears of rent or revenue (sections 70, 71, 73). The sections referring to the case of the mortgagor retaining possession are sections 65 (c) (d) and 66. On the other hand sections 72, 76 and 77 refer particularly to mortgages with possession. If the mortgagor remains in possession he retains all the powers of an owner consistent with the security of his mortgagee. If the mortgagee is in possession, his position is similar to that of a lessee and a similar measure of care is required of him. (Compare section 76 (e) with section 108 (o)). Only, except in cases where he is entitled to keep the rents and profits in lieu of interest, he has to account for them to the mortgagor.

The relation of mortgagor and mortgagee is determined by the settlement of accounts between them and the payment by the former of the amount due, or, on default of such payment, by the extinguishment of the mortgagor's right and the transfer of his interest absolutely to the mortgagee or some third person. Either party may enforce his right by suit, but whichever makes the first move the mortgagor has his right of redemption. Whether the decree be made in a suit for redemption or in a suit for sale or foreclosure, provision is alike made for the right of redemption. The section relating more particularly to redemption are the 60th, 61st, 62nd, 63rd, 64th, 83rd, 84th, 91st to 95th. The sections relating to the mortgagee's suit are the 67th, 68th, 86th to 90th.

The mortgagee's suit is either for foreclosure or for sale. A suit for foreclosure presupposes a conveyance of the legal ownership to the mortgagee, and the object of it is to remove the obstacle which prevents that conveyance from having full effect given to it. (*Carter v. Wake*, 4 Ch. D., p. 606.) In the case of mortgages in England it was the Court

of Chancery that interfered to prevent the conveyance being treated as absolute on default of payment by the mortgagor and give him an opportunity for saving his property to which according to the letter of his contract he was not entitled. This equity or right founded on the doctrine that time was not of the essence of the contract in mortgage transactions is called the equity of redemption. By a decree for foreclosure this equity is extinguished.

The sections relating to foreclosure are sections 67, 86 and 87. Those sections and the remedy which they prescribe have reference only to English mortgages and mortgages by conditional sale. The former mortgage is described as an absolute transfer of the property subject only to a proviso for re-transfer upon payment of the mortgage-money. The latter is described as an ostensible sale of the property made subject to a condition. There can be no doubt that, as in section 122 concerning gifts, transfer of ownership is intended. In mortgages of both classes alike nothing remains to be done by the mortgagor to make the mortgagee the absolute proprietor of the property, but the law gives the mortgagor a *locus pœnitentiæ*, and the right to save the property remains with him until it is taken away by decree for foreclosure. By the order finally made under such decree the mortgagor is absolutely debarred of all right to redeem the property. Ordinarily the realization of a security does not of necessity involve the extinguishment of the debt. By a sale of mortgaged property the debt is extinguished only so far as the proceeds of the sale will serve to satisfy it. The mortgagee has his remedies, whatever they may be, for the balance. But if the creditor chooses to foreclose the mortgage and thus to appropriate the property to himself he cannot afterwards pursue his personal remedy against the debtor. He cannot do so in England except upon terms (see p. 313): he cannot do so under the Act, because the effect of the final order above-mentioned is to extinguish the debt. The law does not permit the creditor to keep his debt alive and at the same time take the property without the intervention of a sale. On the other hand if payment is made by the mortgagor the result is that he becomes entitled to have the property transferred to him free from incumbrances created by the mortgagee and to be replaced in possession. There has to be a re-conveyance to the mortgagor. The same alternative is presented to the mortgagor by the decree which he obtains in a suit for

redemption. The decree directs that on payment he shall have the property re-transferred to him, but that on default he shall be absolutely debarred of all right to redeem the property.

The principle of foreclosure does not apply to mortgages where-

§ 10. Suit for sale. by no transfer of the legal ownership is effected.

For that reason it does not apply to the pledge of moveables, nor does it apply to hypothecations or simple mortgages or mere usufructuary mortgages. A pledgee of moveables has the option of selling them out of court to realize his claim or of having them sold under a decree which also gives him personal relief against the pledgee. (Contract Act, section 176.) Except in the case in which a power of sale out of court is allowed under section 69 of the Act, the mortgagee must have recourse to a suit to bring about the sale of the property. The sections particularly applicable to the suit are sections 88, 89 and 90.

As in a foreclosure decree, an alternative is prescribed to the mortgagor. A period of six months is given him. Within that period he may either pay the mortgage-money and recover his property, or on default the property will be sold. In providing for the former event the Act uses the language which is also applied to foreclosure decrees (section 86, 2nd para.). In the event of the money not being paid, an order for sale of the property is passed. This order and the sale made thereunder divest the mortgagor completely of all right to the property; but except so far as the proceeds are sufficient to satisfy the debt, the mortgagee's right remains and he can recover the balance in the ordinary way from the debtor. In any case of a sale of mortgaged or pledged property, the surplus after the satisfaction of the debt belongs to the mortgagor (sections 88, 93, 97, 138, and Contract Act, section 176). Sale may take place not only in a mortgagee's suit for sale, but also at the instance of any party in a foreclosure suit and in a mortgagor's suit for redemption—provided that in neither of these cases the mortgage is by way of conditional sale.

The result is that whichever party institutes proceedings the decree finally determines the relations between them and, except in the case just mentioned, the mortgagee may have his debt satisfied by a sale of the property. The case of a usufructuary mortgage is no exception; for although the holder of such a mortgage cannot sue for sale, or indeed as long as he is in possession bring

any suit at all, he may, if a suit is brought against him by the mortgagor, apply for an order for sale of the property on default being made by the mortgagor. In the absence of such order and of an order for foreclosure there is nothing to prevent the mortgagor bringing repeated suits for redemption. On the part of the mortgagor the only suit that can be brought is the suit for redemption. It is competent to a mortgagor to bring this suit in any circumstances in which a suit on the mortgage could be brought against him and the same considerations apply to both suits.

Sections 74, 75, 78, 79, 80, 81, 82, 96 and 97 relate to the questions which may arise between the parties to a mortgage or one of them, and third persons who have acquired interests in the property either previously or subsequently to the mortgage. The interest of the mortgagor in the property is not necessarily that of a full and exclusive owner. He may be only a lessee (section 65 (d)), or he may have the interest of a mortgagee. And again after the mortgage is executed, alienations may be made either by the mortgagee or by the mortgagor. It is competent to the mortgagor to deal with the property in any manner not inconsistent with the mortgage. He may give a second mortgage to some third person or otherwise dispose of the property. As between the immediate parties generally there can be no question except as to the precise amount due to the mortgagee, in order to determine which it may be necessary to take an account of the rents and profits received by him. Complications arise when interests have been created derivatively from the mortgagor or the mortgagee. The persons in whose favour such alienations are made are necessary parties to the mortgage suit. That is, they are entitled to redeem the mortgage, or if a suit be brought by the mortgagee they are entitled to be redeemed. There may be a succession of such persons who have taken second, third and other mortgages of the same property. Each of them as against the original mortgagee or the later mortgagees prior in order to himself has his right of redemption. The original mortgagee has to reckon with all subsequent mortgagees, because to the extent of their interest they occupy the place of the mortgagor with regard to the property. They cannot, any more than an outright purchaser of the property, be ignored by the mortgagee. In the same way any one of the series of mortgagees, not being the last, has as against the last no

§ 11. Intervention
of third parties.

lesser right than he has against the mortgagor. The intermediate or mesne mortgagee may sue the mortgagor and the later mortgagees for foreclosure or sale, or he may be redeemed by them. On the other hand he may redeem the prior mortgages. In a mortgage-deed it may be necessary to give effect to all these rights. Again, as the mortgagee may deal with his interest in the property the mortgagor has to reckon with the persons taking such interest either in whole or in part, whether by assignment or by sub-mortgage. As is declared by section eight, the assignee of a debt generally takes with it all the securities therefor; they pass as accessories to the principal. But in order to make the assignment effective as against the debtor, notice to him of it is required, for otherwise the debt may be paid off behind the back of the assignee and the security discharged (see note to section 137). In any case the interest of the assignee cannot exceed that of the assignor, and therefore, in order to measure the interest of the sub-mortgagee, there has to be a settlement of accounts between the mortgagor and the mortgagee.

By a lease the owner of property exchanges the enjoyment of it for a price which usually consists of periodical payments in the shape of rent. The period for which the enjoyment is transferred is generally defined, but it may be indefinite. In any case there is the legal possibility of the lease being determined and the lessor being entitled to resume possession. The relation established between the parties is, unlike that created by a contract of sale, a continuing one. The rules regarding lease regulate the relation of the parties up to the time when the lessee is put in possession, their relations during his period of possession and finally the mode in which his right to possession may be determined and the consequences of such determination.

(1) The obligation on the part of the lessor and the lessee to disclose each to the other facts materially affecting the value of the property is similar to that imposed on the parties to a contract of sale (section 108 (a) (k)). There is also a similar obligation on the part of the lessor to put the lessee in possession (section 108 (b)).

(2) After possession and during the continuance of the lease the main rights and powers of the parties may be stated thus (a) in favor of the lessee, the right to quiet enjoyment, the right to any accessions—the right to remove things attached by him to the

earth, the right to growing crops and the power to alienate his interest to third parties (section 108 (c) (d) (h) (i) (j); (b) on the part of the lessee, the right to have the rent duly paid, to have the property maintained with due care, to have it defended against encroachments.

During the continuance of a lease, the lessor is at liberty to dispose of the property in any manner consistent with the lease. And in the same way the lessee, in the absence of an express contract to the contrary, is at liberty to dispose of his interest. The transfer by the lessor carries with it the right to the rents accruing after the transfer and other right of the lessor under the lease, but as in the case of other rights of demand passing from one person to another, the transferee must assert his right by giving notice to the lessee and a plea by the latter of payment to the lessor before notice is valid (section 131). Generally the burden of an obligation cannot be transferred by the debtor to any other person. But on the transfer of land held under a lease, the lessee has an option and he may hold the transferee liable in respect of the obligations created by the lease. The burden of a covenant touching the land may thus run with the land and bind the purchaser of it. (See p 94.) The lessee's liberty of dealing with his interest in the land may be restrained by a condition (section 10) or by contract. Otherwise he may dispose of it as he pleases and invest his transferee with all his rights under the lease, but he cannot pass off to another the burden of his obligations. He has to look to his transferee for an indemnity against any claim in respect of them. (See section 65 (d)). No general provision is made for the devolution of the obligations of a lease on a transfer of the lessee's interest.

On a transfer by the lessee of his interest he cannot afterwards deal with that interest in a manner inconsistent with his own act. He cannot therefore determine the lease by a voluntary surrender, or by bringing about a forfeiture. It is clear that a notice given to the lessee, who has parted with his interest, can have no effect as against his assignee, and further that notice to an under-lessee, that is a person in whom something less than the whole interest in the lease is vested, cannot affect the lessee. On the other hand the lessor who has parted with his interest is no longer in a position to give notice to the lessee.

(3) The termination of the relations of lessor and lessee may be brought about in the various ways mentioned in section 112. A surrender implies an agreement between the parties. By common consent the contract is rescinded and the lessee gives up his interest. When a lease is determined by forfeiture or notice duly given by either party to the other, there is an act done by one party only and the consent of the other is not required. To determine a lease by notice, notice must be given by the lessor or his assignee to the lessee or his assignee. In the other cases mentioned in section 111 the lease is determined without any act done on either side.

On the termination of the lease each party is to be replaced in the same position as far as possible with regard to the land as before the commencement of the lease. On the one hand the lessee is entitled to remove things which he has brought on to the soil and, in some instances, growing crops. On the other hand the lessor is entitled to have the property restored to him as it was at the commencement of the lease, allowance being made for natural or unavoidable deterioration only.

In the ordinary case of a gift there is a mere transfer of property or of some interest from one person to another, and no further relation between the parties is established. Consent is necessary on both sides, and the transaction may be avoided by the donor if his consent has been improperly obtained, but no contractual obligation is created on either side. The only questions therefore which can arise are whether consent on both sides has been duly given and the transfer has been duly effected.

In the case of moveable property it is declared, the transfer may be effected by delivery (section 123). Here apparently 'moveable property' is not used in the largest sense. At any rate it cannot be intended that negotiable instruments, shares, or other choses in action can be transferred otherwise than in the appropriate way. A gift like any other transfer may be made subject to a condition which may be either precedent or subsequent (section 126 taken with sections 30, 31, 32, 33, 34). It may also be made *sub modo*, an obligation being imposed on the donee. (Compare sections 109 and 110, Succession Act.) At the same time it has been held that an assignment of leasehold property is not a voluntary gift

within the meaning' of the Statute of Elizabeth. (See *Price v. Jenkins*, 5 Ch. D., 619.) The person who accepts a gift subject to an obligation is in effect in the position of a trustee. (Trusts Act, section 3; *Lindley's Thibaut*, § 100, p. lxvii.)

The last chapter is concerned with moveable property and more, particularly with actionable claims and
 § 14. Assignments. debts which are forms of moveable property. This latter is stated in the General Clauses Act to mean property of every description except immoveable property. Some of the various forms it may take are illustrated in the Succession Act (see sections 129, 178). 'Actionable claim,' though an expression less extensive than moveable property, includes other claims than debts. It may be compared with the expression 'chose in action.' According to English authorities any chattel personal not in possession is a chose in action. The term therefore includes a policy of insurance, shares in a company, debentures. (*Colonial Bank v. Whinney*, 11 App. Cas., p. 440.) This wide significance of the term is particularly important in connection with sections 135, 136 and 137. Negotiable instruments are excluded from the operation of the chapter (section 139), and claims for damages in respect of wrongful acts cannot be the subject of assignment.

No provision is made in the chapter with regard to the form in which an assignment of a chose in action should be made. It may be presumed that in this chapter as in that relating to gift the intention was to leave unaffected any laws requiring particular modes of transfer in particular cases.

When it is said that an obligation can be transferred, it is not meant that the debtor may assign his liability to another. (Compare section 108 (j) and section 109.) It is the creditor's right only that can be passed to another. Assignment has thus to be distinguished from novation by means of which, with the concurrence of the debtor as well as the creditor, either the liability or the right may be transferred to a third person. By section eight it is provided that with the debt shall pass to the assignee its accessories, whether securities held for it or interest accruing due in respect of it. Otherwise as between assignor and assignee no positive rules are laid down.

There can be no doubt however that as between the immediate

parties the assignment which is earlier in time must take priority. (Compare section 48.) Once a debt is assigned to B, an assignment of the same debt to C, not followed by any other act, can avail nothing. In such a case C, if it were immoveable property that had been sold to him, would have a right of action against the vendor, for the latter would be deemed to contract that the interest which he professed to transfer subsisted (section 55 (2)). There can be no doubt that the assignee of a debt would have a similar right, as also in the case of the debt having been extinguished by payment, or otherwise, when the assignor purported to assign it. In either case there would be a total failure of consideration.

On the other hand it is clear that to give the assignee a warranty of the solvency of the debtor an express contract is required (section 134). A creditor, selling the debt due to him, has like the owner of property selling it to another to place the buyer as far as possible in his own position with regard to the debt, divesting himself of all rights and powers over it and investing the assignee with the same. It follows that, while the assignee is at liberty to deal with the debt, whether by assigning it again or by releasing it, or accepting payment of it, the assignor surrenders all power of so dealing with it. He is under an obligation not to derogate from his own grant.

As regards the debtor the rights of the assignee cannot exceed those of the original creditor. The debtor is not entitled to be consulted as to the person to whom he should pay, but he is not to be prejudiced, the burden of the obligation is not to be made heavier, by the assignment. If before the assignment took place anything has occurred between the creditor and the debtor to extinguish the obligation or to give a defence to the debtor against the action which might be brought upon it, then precisely the same defence is available to the debtor against an action brought by the assignee (section 137). For instance, if the debtor being the purchaser of land claims to retain out of the purchase-money the amount of any incumbrance on the property, that claim cannot be defeated by an assignment of the purchase-money to a third person. (See p. 166.) Again, if after the assignment the debtor, not having received notice of it, has paid his original creditor, he cannot be called upon to make another payment to the assignee. The immediate loss falls on the assignee who has failed to give notice to the

debtor and so put him on his guard against paying his creditor (sections 50, 109 and 131; compare Trusts Act, s. 28). On such notice being received, his liability to the assignee becomes absolute and cannot be affected by any subsequent transaction with his original creditor. According to certain English cases, notice of assignment, has also, to be considered in questions of conflict between two rival assignees of the same debt. (See pp. 421, 422.) The Act makes no distinction between assignments of a voluntary character and assignments for good consideration, nor is any reference made to the effect which notice of a prior assignment may have on the rights of the person receiving it.



THE TRANSFER OF PROPERTY ACT, 1882.

ACT No. IV OF 1882.

(AMENDED BY ACT No. III OF 1885.)

*An Act to amend the law relating to the Transfer of Property
by act of Parties.*

WHEREAS it is expedient to define and amend certain parts
of the law relating to the transfer of property by act of parties; It is hereby enacted
as follows:—

Preamble.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Transfer of Property Act, 1882":

Commencement.

It shall come into force on the first day of July 1882;

Extent.

It extends in the first instance to the whole of British [1]
India except the territories respectively
administered by the Governor of Bombay
in Council, the Lieutenant-Governor of Panjab and the
Chief Commissioner of British Burma.

But any of the said Local Governments may, from [2]
time to time, by notification in the local official Gazette,
extend this Act to the whole or any specified part of the
territories under its administration.

And any Local Government may, with the previous [3]
consent of the Governor-General in Council, from time to
time, by notification in the local official Gazette, exempt,

either retrospectively, or prospectively, any part of the territories administered by such Local Government from any or all of the following provisions, namely:—Sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three.¹

Notwithstanding any thing in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act, or otherwise.²

Commentary.

Note 1. Some sections are specially limited in their operation. Sections 59 and 69 contain provisions which relate exclusively to mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. Sections 37 and 117 enact that neither the provisions of the Act as to the apportionment of the benefit of an obligation on its severance, nor the various provisions of Chapter V shall apply to leases for agricultural purposes, unless the Local Government declare some or all of them to be so applicable in accordance with those sections.

An exemption from the operation of the Act has been made with retrospective effect by the Crown Grants Act, 1895, of which sections 2 or 3 are as follows: “(2) Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or other transfer of land or of any interest therein heretofore

1 This paragraph was substituted by the Amendment Act—Act III of 1885—section 1, for the following:—

“And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections forty-one, fifty-four, paragraphs two and three, fifty-nine, sixty-nine, one hundred and seven and one hundred and twenty-three.”

2 The Amendment Act—III of 1885—section 2, provides that this “paragraph shall be deemed to have been added to the first section of the said Act from the date on which it came into force.”

made or hereafter to be made by or on behalf of Her Majesty, the Queen Empress, her heirs or successors, or by or on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but every such grant and transfer shall be construed and take effect as if the said Act had not been passed. (3) All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid, shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

Note 2. The Act in its amended form confers on Local Governments certain powers, which may be classified according as they relate to the place, or the subject-matter of the transfer, or the persons who are parties to it. (1) The present section empowers the Governments of territories excepted in paragraph 3, to extend the operation of the Act to the whole or any part of those territories¹; and paragraph 5, as amended, empowers any Local Government—whether of a province originally subject to or subsequently adopting the Act—either prospectively or retrospectively, to make certain local (not, as originally, personal) exemptions from the application of certain sections, which include, however, all those mentioned in the paragraph as it originally stood, except sections 41 and 69. (2) Sections 37 and 117 create powers to extend prospectively to agricultural leases certain provisions of the Act, from which they are primarily exempted. (3) Section 69 in its present form enables the Local Government to specify classes of persons, in addition to those already mentioned, whose participation in an English mortgage shall exclude the operation of certain provisions contained in that section and in sections 6 to 19 of the Trustees' and Mortgagees' Powers Act.² The other similar powers created by the Act appear in section 57 (e), which enables the Local Government to extend the jurisdiction of Courts for the purposes of that section, and section 104, which empowers the High Courts to make rules for carrying out the provisions of the Act relating to mortgages or charges on immoveable property.

The doubt which at one time existed as to the validity of such powers as are here conferred on the Local Governments was removed by the decision of the Privy Council in *Empress v. Burah*.³ In that case it was held by the Privy Council, reversing the decision of the High Court of Bengal, that the Indian Legislature not only had power

1 The Act was extended to the Bombay Presidency on the 1st January 1893.

2 Act XVIII of 1866. With regard to the application of Hindu law, &c., to cases of the transfer of property, see section 2 (d).

3 I. L. R., 4 Cal., 180.

to remove a district from the jurisdiction of the High Court and vest the administration of justice in persons to be appointed by the Lieutenant-Governor, but also could empower the Lieutenant-Governor to extend the operation of the enactment to any other district by public notification.

Certain sections of the Act have been extended to Cantonments.¹

Note 3. The Registration Act—Act III of 1877—extends (see section 1, paragraph 2) “to the whole of British India, except such districts or tracts of country as the Local Government may from time to time, with the previous sanction of the Governor-General in Council exclude from its operation.”

Section 1 of the Amendment Act, which excludes from the list of the originally specified sections, section 41 (relating to transfers by ostensible owners) and section 69 (relating to powers of sale in certain mortgage deeds) is not retrospective. The sections referred to in paragraph 5 as it now stands, and in the additional paragraph 6, which ‘shall be deemed to have been added to section 1 of the Act from the date on which it came into force,’ prescribe, among other things, the registration of certain instruments of (section 54) sale, (section 59) mortgage, (section 107) lease, and (section 123) gift; and section 4 now declares that these sections shall be read as supplemental to the Registration Act, 1877.

- [] **2.** In the territories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—
- Repeal of Acts. the time being, the enactments specified
- Saving of certain enactments, incidents, rights, liabilities, &c. in the schedule hereto annexed shall be repealed to the extent therein mentioned.

- [2] (a) the provisions of any enactment not hereby expressly repealed:
- [3] (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force:
- [4] (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability: or,

(d) save as provided by section fifty-seven, and chapter four of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction: and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

Commentary.

Note 1: Besides the scheduled enactments, the Act repeals for the cases to which Chapter IV applies section 43 of the Code of Civil Procedure, so far as it contains any thing to prevent a mortgagee who has already sued the mortgagor personally from instituting a suit for foreclosure or sale under section 67;¹ and by section 87 it makes an alteration in Schedule IV, No. 129 of the Code, by substituting the words 'decree absolute' for 'final decree.'

Note 2. Section 69 extends the application of sections 6 to 19 of the 'Trustees' and Mortgagees' Powers Act of 1866 to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a member of any of the specifically indicated classes.

Note 3. With this clause may be compared section 1 of the Contract Act, which exempts from its operation any usage or custom of trade, and any incident of any contract not consistent with its provisions.² It is expressly provided in section 139 that nothing contained in Chapter VIII shall apply to negotiable instruments.

Note 4. By section 6 of the General Clauses Act, 1868,³ it is provided that the repeal of any Statute, Act, or Regulation shall not affect any thing done, or any proceeding commenced, before the repealing Act shall have come into operation. The present clause similarly preserves to any legal relation constituted before the Act comes into force the rights, liabilities and relief which would have attached to it independently of the Act. These provisions are consistent with the general principle that, while no one has a vested right in any form of procedure, substantive rights

¹ See section 99.

² As to interpretation of these words, see *Moothora Kant v. India General Steam Co.*, 1. L. R., 10 Cal., 166; and see also next note and cases there cited.

³ Act I of 1868.

are not to be prejudiced by a change in the law.¹ For instance the rights acquired by a purchaser of mortgaged property, in whose favour time had run before the passing of the Act, could not be affected by the subsequent introduction of foreclosure suits for which under article 147 of the Limitation Act the sixty years period is allowed. The right of the mortgagor, having been extinguished owing to the expiry of the time allowed by article 135, could not be revived on the passing of this Act.² On the other hand, in the matter of procedure in mortgage suits instituted after the Act came into force the general rule is that the provisions of the Act must apply.³ The cases in which this clause has been discussed are for the most part cases in which, the relation of the parties having originated in mortgages executed before the 1st July 1882, the question has arisen whether in respect of such mortgages the provisions of the repealed Regulation XVII of 1806 are still to take effect to the exclusion of the Act, and whether the provisions of section 99 are applicable.

It has been held by Full Bench Courts as well in Calcutta as in Allahabad⁴ that, where proceedings have not been taken under the Regulation and the mortgagee's suit has been instituted after July 1882, the present clause does not preserve to the mortgagor any right to have the procedure prescribed by the Regulation followed or to require the twelve months' notice therein provided. The rules laid down in the Regulation, as also those laid down in the Act, were deemed to be rules of procedure. Trevelyan, J., discussing the clause, says—

“The question is whether the provisions of the Regulation are saved by the Act? The right of the mortgagor is to have back his property on payment of the mortgage debt. The liability of the mortgagor is to have his property sold or foreclosed. The relief in respect of the mortgagor's right is the re-conveyance or giving back of the property to him. The relief in respect of the mortgagee's right (which is equivalent to the mortgagor's liability) is the payment of the mortgage money, or, in case of non-payment, the foreclosure of the mortgagor's equity of redemption. There is, I think, a clear distinction between relief and the mode or procedure for obtaining such relief. The relief remains unaffected by the change of the procedure. The rights and liabilities of the mortgagor and

1 Warner v. Murdoch, 4 Ch., D., p. 752: see generally as to consequences of change of law *Re Ratansi Kalianji*, I. L. R., 2 Bom., 148.

2 Srinath Das v. Khetter Mohun, I. L. R., 16 Cal., 693; and see Nanu v. Raman, I. L. R., 16 Mad., 335.

3 Venkatasami v. Subramanya, I. L. R., 11 Mad., 88; Umda v. Umrao, I. L. R., 1 All., 307; Shiva Devi v. Jaru, I. L. R., 15 Mad., 290.

4 Bhoob Sundari v. Rakhal, I. L. R., 12 Cal., 583; Ganga Sahai v. Kishen, I. L. R., 6 All., 262.

"mortgagees, and the relief in respect of such rights and liabilities, are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has however been adopted. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it."¹

In cases, where before the 1st July 1882 proceedings have been taken under the Regulation and the suit has been brought after that date, further difficulty arises. In *Pergash Koer v. Mahabir*² an attempt was made to engraft the provisions of the Act on the Regulation. Notice of foreclosure had been served on the mortgagor and as against him the year of grace had expired, but in the suit for possession a purchaser intervened on whom the notice to which he was entitled had not been served. The High Court of Bengal considered that the mortgagor had a vested right to a year's notice and that that right was preserved to him by this clause. In the decree which was drawn up under section 86 of the Act, the Court therefore substituted one year for the six months. In the case before the Full Bench, referred to above, however, Trevelyan, J., expressed his disapproval of this decision.

In other cases where proceedings under the Regulation have been instituted against the defendant, it has been considered that the suit must be decided with reference to it and not be treated as one instituted under the Act. Where the proceedings have come to a close and the year of grace has expired before the Regulation was repealed and the Act came into force, there can be little doubt that the relations of the parties remain unaffected by the Act. Such cases must clearly be saved by the clause, rights and liabilities having arisen out of a legal relation constituted before the Act came into force.³ But the Courts have come to the same conclusion in cases in which the year of grace has not expired while the Regulation was still in force, and a suit has been subsequently brought by the mortgagee for possession. In *Sitla Baksh v. Lalta Prasad*,⁴ the plaintiff framed his suit under the Regulation, alleging that steps had been duly taken under it and that the year of grace had expired, and praying for possession accordingly. On his failing to prove that he had satisfied the provisions of the Regulation, he was not allowed to treat the suit as one instituted under the Act. In the judgment no reference is made to the terms of the section or to the previous rulings on it. In a Bengal case, where the

¹ I. L. R., 12 Cal., 589.

² I. L. R., 11 Cal., 582.

³ *Baij Nath v. Moheswari*, I. L. R., 14 Cal., 451.

⁴ I. L. R., 8 All., 388.

dates were similar, the defendant took the objection that, as the year of grace had not expired when the Regulation was repealed, the course prescribed by section 86 should be followed and he should be allowed six months to redeem. This objection was overruled. "It is true," it was said, "that the full and complete right of the mortgagee had not accrued; but we think it impossible to say that he had acquired no right, for at the time the Transfer of Property Act came into force, he had acquired the right to bring a suit under the provisions of the Regulation at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year."¹ The same conclusion was arrived at in a later case by the same Court differently constituted.² In that case Mitter, J., appeared to be satisfied with the reasoning upon which the previous decision proceeded. Beverley, J., on the other hand, expressed some doubt as to whether it was in accordance with the principle laid down by the Full Bench. But they were both of opinion that, the proceedings for foreclosure having been commenced under the Regulation, the application of the Act was excluded by section 6 of the General Clauses Act. The service of notice was deemed to be an act done within the meaning of that section.

With reference to section 99, it has been decided that the holder of a decree, made before the Act came into force and directing the sale of mortgaged property, is not affected by the provision of section 99. The section was considered inapplicable to mortgage decrees; but even if it were otherwise, the mortgagee's right to have the property sold in accordance with the decree was, it was said, preserved to him by section 2.³ Furthermore, in a case where a decree for money was obtained in 1884 for arrears of interest due under a mortgage of 1879, it was held that section 2 was inapplicable.⁴

The opinion has been expressed in the Madras High Court, that the Act gives the holder of a hypothecation instrument a right to call for a sale which he did not previously possess, and that, in respect of this new provision, the Act cannot have a retrospective operation and apply to instruments executed before the 1st of July 1882. Taking this view, Muttusami Ayyar, J., ruled that a plaintiff suing on such an instrument

*Hypothecations,
leases, assignments.*

¹ Mohabir v. Gungadhar, I. L. R., 14 Cal., 604.

² Umesh Chunder v. Chunchuz, I. L. R., 15 Cal., 357.

³ Dinendra v. Ohandra, I. L. R., 12 Cal., 436; followed in Narasappa v. Samacharlu, I. L. R., 19 Mad., 383.

⁴ Kaveri v. Ananthayya, I. L. R., 10 Mad., 129.

must bring his suit within the twelve years given by article 132 of the schedule to the Limitation Act,¹ and that article 147 did not apply to the case.² Where a question of forfeiture for non-payment of rent due under a lease of 1849 arose, it was observed by the same Court that sections 111 and 112 of the Act would have no application.³ On the other hand in the case of an assignment after the 1st of July 1882 of a mortgage made before that date, it has been held that the provisions of the Act, as to the assignment of actionable claims, are applicable.⁴

Note 5. Transfers by operation of law do not come within the scope of the Act, which has for its object 'to define and amend certain parts of the law relating to the transfer of property by the act of parties.'⁵ Sale in execution of a decree is the common instance of transfer by operation of law. Accordingly a purchaser of a debt sold in execution is not affected by the provisions of section 135.⁶ A question has been raised, but not decided, whether a sale made with the sanction of the Court by the official liquidator of a company that was being wound up was a transfer in execution of an order of a Court within the meaning of this clause.⁷ Section 57 provides a method whereby, under the orders of the Court, immoveable property may be freed from incumbrances on any sale of it taking place; and Chapter IV relates to mortgages. Nothing in Chapter VII affects any rule of Muhammadan law or, save as provided in section 123, any rule of Hindu or Buddhist law (section 129).

The effect of the second part of this clause is to leave Hindus *Transfer by Hin-* under the rule in the Tagore case.⁸ The Law Com-
mus. missioners say at p. 28 of their Report of 1879—

"The Privy Council has already ruled that estates cannot be created by "Hindus in contravention of the principles which underlie the Thellusson Act, or

1 Act XV of 1877.

2 See however as to limitation note 2 to section 58.]

3 Narayana v. Narayana, I. L. R., 6 Mad., 327. As to notice to quit see Ambabai v. Ban, I. L. R., 20 Bom., 754, *quære* whether the Act applies to a case in which the relationship of landlord and tenant existed before the Act came into force.

4 Lala Jugdeo Sahai v. Brij Behari Lal, I. L. R., 12 Cal., 505; Subbammal v. Venkatarama, I. L. R., 10 Mad., 289; Rathnasami v. Subramanya, I. L. R., 18 Mad., 56.

5 See preamble.

6 Krishna v. Perachan, I. L. R., 15 Mad., 383.

7 Gaya Prasad v. Baij Nath, I. L. R., 14 All., 176.

8 9 Beng. L. R., 377; Bhairo v. Parmeshri, I. L. R., 7 All., 516; Tarokessur Roy v. Soshi Shikuresur, L. R., 10 I. A., 51; s.c. I. L. R., 9 Cal., 959; Shookmoy v. Monohari, I. L. R., 7 Cal., 289; affirmed by the Judicial Committee, I. L. R., 11 Cal., 484; Kristomoni Dasi v. Narendro Krishna, I. L. R., 16 Cal., 383; Manjamma v. Padmanabhayya, I. L. R., 12 Mad., 393; Krishna v. Vythianatha, I. L. R., 11 Mad., 253; Javerbai v. Kablibai, I. L. R., 15 Bom., 326.

"subject to conditions, which are void for repugnancy. The rules contained in sections 10 to 35 impugn, as far as our experience goes, no rule or practice of Hindus or Muhammadans or other sects recognized in India as enjoying special personal laws, unless it may be the now obsolete practice among the Muhammadans of devoting property to the family of a particular saint.¹ But to avoid any disturbance of rights enjoyed under personal laws, sufficient provision is made by the Bill."

With regard to the exemption of Hindus from the operation of Chapter II, Mr. Evans in his speech of the 26th January 1882 is reported to have said that—

"His difficulties on this point had been removed in a singular^{*} manner. The Hon. Maharajah Jotindra Mohan Tagore and the Hon. Rajah Siva Prasad, conceiving in common with many of their fellow-countrymen, that the rule in the Tagore case did not correctly represent the Hindu law, and that Hindus were by their own law empowered to tie up their property for ever without any restriction, had rejected the extensive powers conferred on them by the Bill as too limited, and had asked that a clause should be added to Chapter II, providing that nothing contained in that Chapter should affect any rule of Hindu law. As the effect of this was to leave this important question as it stood for the present, and to give an opportunity for its full consideration in future, he gladly acceded to the proposed amendment, though regarding it from a different point of view from that taken by its proposers. For his part he would sooner repeal the corresponding sections of the Hindu Wills Act, and stick to the rule in the Tagore case with an exemption in favour of bequests to, or settlements on, unborn children of a Hindu daughter, to take effect on the death of the daughter."¹

3. In this Act, unless there is something repugnant in the subject or context,—

Interpretation-
clause.

[1]

"Immoveable
property"

"immoveable property" does not include standing timber, growing crops or grass:

"instrument."

"instrument" means a non-testamentary instrument:

"registered" means registered in British India under the law for the time being in force regulating the registration of documents:

"registered."

[2]

"attached to the
earth."

"attached to the earth" means—

(a) rooted in the earth, as in the case of trees and shrubs;

¹ See p. 75 of the Abstract of proceedings of the Council of the Governor-General of India, Vol. XXI.

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached:

and a person is said to have "notice" of a fact when [3]
 "notice," he actually knows that fact, or when, but
 for wilful abstention from an inquiry or
 search which he ought to have made, or gross negligence,
 he would have known it, or when information of the fact
 is given to, or obtained by, his agent under the circum-
 stances mentioned in the Indian Contract Act, 1872, sec-
 tion 229.

Commentary.

Note 1. If the interpretation of the term "immoveable property" contained in this section is to be read with that contained in the General Clauses Act, 1868¹ the term will include for the purposes of this Act;—"land, benefits to arise out of land; or things, as trees and shrubs rooted, or as walls and buildings imbedded in the earth, or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is so attached, or permanently fastened to anything so rooted, imbedded or attached; but not standing timber, growing crops or grass."

It is substantially in these terms that immoveable property is described in the Registration Act.* In fact it has been said that "immoveable property comprehends certainly all that would be real property

¹ Act I of 1868, section 2; *Pandah Gazi v. Jennuddi*, I. L. R., 4 Cal., 665; *see Baban Mayacha v. Nagu*, I. L. R., 2 Bom., 19; *Bhundal v. Pandol*, I. L. R., 12 Bom., 222.

² Act III of 1887, section 3; compare Indian Succession Act, section 3. In other Acts different definitions are given, but, being made for the purpose of particular Acts only, they will not be regarded in construing the present Act. Under the Small Cause Court Act, XI of 1865, it has been held that growing crops and trees are not moveable property, *Gopal Chandra v. Ramjan*, 5 Beng. L. R., 194; *In re Hormasji Irani*, I. L. R., 13 Bom., 87; and similarly, that standing crops are immoveable property within the meaning of the Limitation Act, *Pandah Gazi v. Jennuddi* (*supra*) and within the meaning of the Civil Procedure Code and Provincial Small Cause Court Act, 1887, *Madayya v. Venkata*, I. L. R., 11 Mad., 193; *Cheda Lal v. Mulchand*, I. L. R., 14 All., 30; *Ganga Pershad v. Narain*, I. L. R., 15 All., 394.

according to English law and possibly more.”¹ The “benefits to arise out of land” which are included in the term immoveable property cover such incorporeal rights as a *toda giras huq*,² a *bât*,³ a right to a fishery⁴ and a right of ferry.⁵ (See further note to section 5 as to meaning of ‘property.’)

In excepting standing timber, growing crops and grass from the category of immoveable property, regard has probably been had to the fact that they are all things usually contemplated as severable, or intended to be severed, from the soil.⁶ When such severance is not intended, but on the contrary it is contemplated that the purchaser of the trees shall derive some benefit from their further growth, it is an interest in immoveable property that the purchaser takes.⁷ By ‘timber’ is generally meant such trees only as are fit to be used in building and repairing houses. Thus in England oak, ash and elm trees are considered timber, provided at least they have attained a certain age and size.⁸ Trees fit for firewood only, or not sufficiently grown to produce useful wood, clearly could not be ranked as timber.

The term ‘growing crops’ includes all vegetable growths, whether in the form of fruit, leaf, bark or root, and no distinction is made between natural and cultivated growths. While cinchona plants or tea or coffee shrubs are immoveable property, the bark, leaves and berries are moveable. Thus a mortgage of a crop of sugar-cane does not need registration.⁹ As regards next year’s crop, not being ‘the growing crop,’ it has been held that an hypothecation of it does not come within the purview of this Act and is not a pledge of specific moveable property, governed by the Contract Act. It is in the nature of an agreement to mortgage moveable property

1 *Fattehsanji v. Dessai*, L. R., 11 I. A., p. 52.

2 *Ib.*, p. 34.

3 *Surendra v. Bhai Lal*, I. L. R., 22 Cal., 752.

4 *Fadu Jhala v. Gour Mohun*, I. L. R., 19 Cal., 544; *Bhundhal v. Pando*, I. L. R., 12 Bom., 221; *Ramgopal v. Murumuddin*, I. L. R., 20 Cal., 416.

5 *Krishna v. Akilanda*, I. L. R., 13 Mad., 54.

6 See *Sukry Kur'appa v. Goondakull*, 6 Mad. H. C., 71; approved by F. B. in Reference under Forest Act, section 39, I. L. R., 12 Mad., 209; for cases on Statute of Frauds, *Marshall v. Green*, 1 O. P. D., 35; *Jones v. Flint*, 10 A. & E., 753; *Sainsbury v. Matthews*, 4 M. & W., 348; *Benjamin on Sale*, 3rd ed., pp. 109, 111.

7 *Seeni Chettiar v. Santhanathan*, I. L. R., 20 Mad., 58; see *Takharam v. Vishram*, I. L. R., 19 Bom., 207, where a single tree was sold.

8 *Woodfall's Landlord and Tenant*, 12th ed., p. 590; 3 Steph. Comm., 8th ed., 420.

9 *Kalka Prasad v. Chandan*, I. L. R., 10 All., 20.

which may in the future come into existence.¹ Under the Contract Act there may be a sale of the growing crop which may take effect immediately, while as to next year's crop section 87 of that Act applies, and there can be no sale to take effect immediately.

'Grass,' it is apprehended, in the same way means the present or growing herbage, and a right to depasture or to cut
Grass. grass for an indefinite time would be regarded as a right in immoveable property. Clearly a right of turbary would belong to the category of rights in immoveable property. And even the present turf ready for cutting is not within any of the exceptions so as to be taken out of the same category.

Note 2. The various meanings of the expression 'attached to the earth' are discussed in note 2 to section 8.

Note 3. A person has notice within the meaning of the Act in the following ways;—he may have actual notice which, in English books, is usually called express notice, or notice may be imputed to him (1) by reason of his wilful abstention from an inquiry which he ought to have made, or (2) by reason of his gross negligence, or (3) by reason of his agent's knowledge.

It has been said that this section, which is reproduced from the Indian Trusts Act—Act II of 1882—s. 2, correctly
Wilful abstention,
&c. codifies the law as to notice which existed before the Act was passed.² And in using the phrases 'wilful abstention' and 'gross negligence' in connection with the doctrine of notice, the Legislature has adopted the language of the English cases. It thus becomes necessary to see what meaning has been put upon them by the English Courts. In *Jones v. Smith*,³ Wigram, V.C., makes an often-quoted statement of the law of notice, saying—

"The cases in which constructive notice has been established, resolve themselves into two classes:—First, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the Court has been satisfied from the evidence before it, that the party charged had designedly abstained from

¹ *Misri Lal v. Mozhar*, I. L. R., 13 Cal., 262.

² *Churaman v. Balli*, I. L. R., 9 All., 691.

³ 1 Hare, 43. As to "wilful" see *In re Young and Harston's Contract*, 31 Ch. D., 174; *Joshua v. Alliance Bank of Simla*, I. L. R., 22 Cal., 185, 203. The abstention from inquiry and search must be such as to show want of *bona fides*.

"inquiry for the very purpose of avoiding notice. How reluctantly the Court has applied and within what strict limits it has confined the latter class of cases, I shall presently consider. The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instruments, which, in truth, related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly obtained from such inquiries for the purpose of avoiding knowledge—a purpose which if proved would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind, if there want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply; then the purchaser will in equity be considered, as in fact he is, a *bond fide* purchaser, without notice."

In making the above statement, Wigram, V.C., omits to refer to gross negligence as a ground for imputing notice. But in a later case he repairs this omission.¹

The phrase 'gross negligence' is used with reference to various legal relations. And, as in other cases, bad faith or culpable default may be inferred from conduct which, not being the conduct of a reasonable or honest man under the circumstances, is characterised as grossly negligent: so in connection with notice, the design to avoid knowledge of facts which it concerns a man to know may be imputed to him when in consequence of his gross negligence he has failed to learn them.² It has been observed that negligence which imports absence of design cannot correctly be accepted as evidence of a design to avoid knowledge.³ But conduct which might be called negligent may also be explained on the supposition of a design to remain in the dark, and in that sense it may be said that there may be negligence which amounts to fraud.⁴ It must also be noted with regard to the phrase 'gross negligence' and the words immediately preceding it in the section, that in strictness there is not, as the language would seem to import, any legal duty to make inquiries. A purchaser owes no such duty to the public or to other persons interested in the property. It is only because he neglects to do what in prudence he

1 *West v. Reid*, 2 *Hara*, 257; *Dart's Vendors and Purchasers*, 6th ed., p. 972.

2 See *Ragnuada v. Nathamni*, 5 *Mad. H. C.*, 423; and see *Giblin v. McMullen*, *L. R.*, 2 *P. & O.*, p. 336, as to gross negligence in a bailee; *Jones v. Gordon*, 2 *App. Cas.*, 628.

3 *Northern Counties Insurance Co. v. Whipp*, 26 *Ch. D.*, 482.

4 *Kettlewell v. Watson*, 21 *Ch. D.*, 707; *Austin's Jurisprudence*, pp. 411, &c.

should do with a view to his own title and his own security, that the omission if unexplained may be taken as evidence of a design to avoid knowledge of the real state of the title.¹ When, moreover, it is said that a purchaser ought to have made inquiries, "the circumstances to prompt inquiry must be of a specific character, so that the Court can say that some particular inquiry ought to have been made—something as the starting point of an inquiry which might be expected to lead to some result."² With regard to title-deeds which do not come into the hands of a purchaser, his conduct in not asking for them may be evidence of a design on his part to avoid notice. Accordingly one who purchases land under an agreement which requires him to be satisfied with proof of title extending over a limited number of years is affixed with constructive notice of any circumstance affecting the land which would have been brought to his knowledge on a more extended investigation of the title, if the title-deeds earlier in date had come into his possession.³ However absence of the title-deeds is not by itself sufficient to affect a party with notice. It may be accounted for as in *Agra Bank v. Barry*,⁴ where the legal mortgagee asked for the title-deeds and received an explanation for their absence which seemed satisfactory, and it was accordingly held that he had priority over an equitable mortgagee in whose hands the deeds had been lodged. In that case it was observed that it would be quite inconsistent with the policy of the Register Act, which tells a purchaser that a prior unregistered deed is void as against a later registered deed, to hold that he is under an obligation to make inquiries with a view to the discovery of unregistered interests. In a country where a law of registration prevails, notice of unregistered instruments cannot be imputed to the same extent as it might in the absence of such law.⁵ But it is quite consistent with that, that if a purchaser knows of the existence of such instruments when he takes his own deed, he may be estopped from saying that as against him they are fraudulent.⁶

1 *Agra Bank v. Barry*, L. R., 7 H. L., 157, *Bailey v. Barnes*, [1894] 1 Ch., p. 35; *Joshua v. Alliance Bank of Simla*, I. L. R., 2 Cal., 203; see also *re Wyatt*, [1892] 2 Ch., 188, where one taking an equitable charge from two trustees was satisfied with obtaining information as to the property from one trustee only.

2 *Ramcoomar Koondoo v. McQueen*, 11 Beng. L. R., 54; and see *Churaman v. Balli*, I. L. R., 9 All., 591, and note to section 79.

3 *Re Cox & Neve's Contract*, [1891] 2 Ch., 117; see further as to conditions of sale note 3 to section 55.

4 L. R., 7 H. L., 157; see also *Maxfield v. Burton*, L. R., 17 Eq., 15; *Spencer v. Clarke*, 5 Ch. D., 137.

5 *Doorga Narain v. Baney Madhub*, I. L. R., 7 Cal., 199; *Kettlewell v. Watson*, 26 Ch. D., 501.

6 See *Kishorbhai Gallabhai v. Jorabhai Daji*, 7 Bom. H. C. (A. C.), 56; see also note to section 54.

In the statement referred to above, Wigram¹ V.C., mentions, as a distinct class of cases in which constructive notice has been established, those in which the party charged has had actual notice that the property in dispute was incumbered or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry concerning the incumbrance or other circumstance affecting the property of which he had actual notice.¹ If his ignorance of the fact is due to his failure to search the records kept under the Registration Act² or to procure the ordinary investigation and require a deduction of title, notice of such fact may be imputed to him; and it is no excuse that he was precluded by the terms of his contract or otherwise from making the inquiry. He is only excused if inspection of a document, from which actual notice would have been derived by him, cannot be obtained with ordinary trouble, or if he is assured that a deed not necessarily affecting the land, does not in fact affect it:—for a distinction is to be drawn between deeds which must affect the title and those which may or may not affect it. In the case of the former a purchaser is bound at his peril to inspect them for himself, whereas with the latter he may rely on an assurance that the deed does not in fact affect the property.³ While notice of the fact that title-deeds are in the hands of another person is by presumption notice also of the reason why they are so,⁴ this presumption may be rebutted by proof that the purchaser made a *bonâ fide* inquiry and was deceived and put off his guard by a plausible and reasonable excuse for their absence.⁵ Yet, when in answer to inquiries by a purchaser it was said ‘the title is unencumbered and the title-deeds are at my bankers’ for safe custody,’ the purchaser was held to be affected with constructive notice of the actual reason of the deposit of the deeds.⁶

If one has actual notice of a deed as affecting the estate in question and has a fair opportunity of examining it, he is fixed with constructive notice of all the instruments, &c., which an examination of the deed would have

Notice of deed is notice of its contents.

1 Jones v. Smith, 1 Hare, 43; and see Patman v. Harland, 17 Ch. D., 353; Kanayalal v. Pyarabai, 1. L. R., 7 Bom., 145.

2 Churaman v. Balli, 1. L. R., 9 All., 591; see however cases cited *post*, p. 20.

3 Patman v. Harland, 17 Ch. D., 353; Kanayalal v. Pyarabai, 1. L. R., 7 Bom., 145; English & Scottish Investment Co. v. Brunton, [1892] 2 Q. B., 700.

4 Maxfield v. Burton, L. R., 17 Eq., 15.

5 Hewitt v. Loosemore, 9 Hare, 449, approved *per* Lord Chelmsford, C., in Esplin v. Pemberton, 3 DeG. & J., 547; Jones v. Smith, 1 Hare, 43.

6 Maxfield v. Burton, L. R., 17 Eq., 15.

brought to his knowledge. Thus for instance if one contracts to take an underlease¹, or otherwise to deal with property affected by a lease of which he has notice, he is assumed to be cognizant of the covenants contained in it, provided that he had a fair opportunity of ascertaining its terms beforehand. This rule has recently been restated and acted upon by the Court of Appeal in a case of an agreement to purchase a lease. Fry, L.J., in delivering the judgment of the Court said²:—"We cannot but observe that there is a great practical convenience in requiring the vendor who knows his own title to disclose all that is necessary to protect himself, rather than in requiring a purchaser to demand an inspection of the vendor's title-deed before entering into a contract."

The fact that another is in possession may be sufficient to put one dealing with the property on inquiry as to the nature and extent of his interest.³ If that inquiry is not pursued, the purchaser will be affected at any rate as against that other with notice of the title, if any, under which the possession is enjoyed, and of any contract he may have entered into for the purchase of the property.⁴ So the lessee of cultivated land from a zamindar was held by the High Court of Allahabad to be affixed with constructive notice of the occupancy rights of the cultivators as to whom he had failed to make inquiries.⁵ Again, in an English case, in which it appeared that certain bankers had made an advance on a mortgage of premises, known by them to be occupied by the mortgagor's firm, it was held that they had constructive notice of the extent of another partner's interest in the land.⁶ And where a purchaser sued his vendor for compensation in respect of certain unusual terms under which third persons were in possession of the land from the vendor, the Court of Common Pleas, while deciding the case on other grounds, expressed approval of those cases in which the above rule had been applied even as between

1 Hyde v. Warden, L. R., 3 Ex. D., 72; Rajaram v. Krishnasami, I. L. R., 16 Mad., 301.

2 Reeve v. Berridge, 20 Q. B. D., 523; *In re White & Smith's contract*, [1896] 1 Ch., 637.

3 See section 85 Jugul Kissors v. Kartick, I. L. R., 21 Cal., 120.

4 Santaya v. Narayan, I. L. R., 8 Bom., 182; Kānayat v. Pyaraba, I. L. R., 7 Bom., 145; Nanjundepa v. Hemapa, I. L. R., 9 Bom., 16; Manchharji v. Kongseon, 6 Bom., H. C., O. C., 59; Hakeem Meah v. Beejoy, 22 W. R., 8; Massin Meah v. Sham Doss, *ib.*, p. 189; Daniels v. Davison, 16 Ves., 119; 17 Ves., 433; see also note to section 40.

5 Bisheshar v. Muirhead, I. L. R., 14 All., 362

6 Cavender v. Bulteel, L. R., 9 Ch., 79; and see LeNeve v. LeNeve, 2 White and Tudor's Leading Cases, 26.

vendor and purchaser.¹ But in a suit by the vendor for the specific performance of a contract to sell a public house, which was resisted by the purchaser on the ground that although he had previous notice of the occupation of a tenant, he was entitled to refuse to complete on discovering that the premises were held under a lease which had eight years to run, the Court of Appeal refused to apply the above rule of constructive notice.² James, L.J., after referring to *dicta* to the effect that it is applicable as between vendor and purchaser and whilst the matter still rests in contract added:—"I am not at present prepared to assent to any such proposition. The doctrine in question seem to me to refer to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser:—"If you had gone to the tenant and enquired you would have found out all about it." It has been laid down distinctly by the Privy Council that "there is no authority for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on."³

Constructive notice of incumbrances by the possession of third parties has been said to be an instance of the rule "that when a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden he is taken to have notice of the extent and nature of that burden."⁴ But the rule extends further, and when a state of circumstances exists which is very unlikely to exist without a burden the purchaser is affected with notice.⁵ Thus for instance the purchaser of lands situated below the level of the sea is bound to enquire how all walls necessary

¹ Phillips v. Miller. L. R., 9 C. P., p. 207; this case was reversed on appeal in L. R., 10 C. P., 420.

² Caballero v. Henty, L. R., 9 Ch., p. 449.

³ Barnhart v. Greenshields, 9 Moo. P. C., 18, cited and followed in Gunamoni v. Bussunt, I. L. R., 16 Cal., 414; and in Ahmed Bhoj v. Balkrishna, I. L. R., 19 Bom., 393; see Morgan v. The Government of Haidarabad, I. L. R., 11 Mad., 419.

⁴ Allen v. Seckham, 11 Ch. D., p. 795.

⁵ *ib.*, p. 796, and see Hervey v. Smith, 22 Beav., 299; Dart's Vendors and Purchasers, 6th ed., p. 251.

for the protection of his property against the encroachment of the sea are maintained.¹ And Mr. Dart observes:—

“It may often be prudent for a purchaser to enquire whether any undisclosed easement such as a way of necessity or a right of light or of drainage exists over or through the property; such an easement may pass or be reserved by implication without express words; and the existence of such an easement where it is patent and no enquiry has been made respecting it is no defence to a vendor's suit for specific performance.”²

But the mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them.³

In Bombay the principle has been adopted that registration of an instrument operates as constructive notice of it to all subsequent purchasers of the property to which it relates. An exception is however allowed in the case of fraud practised on the person against whom it is sought to apply the rule,⁴ and the doctrine is not carried to the extent of holding that registration is notice of the unregistered documents under which the holder of a registered document derives his title.⁵ Story, speaking of that principle as accepted in America, says:—“The reasoning, upon which that doctrine is founded, is the obvious policy of the Registry Act, the duty of the party purchasing under such circumstances to search for prior incumbrances, the means of which search are within his power, and the danger so forcibly alluded to by Lord Hardwicke, of letting in parol proof of notice or want of notice of the actual existence of the conveyance. The American doctrine certainly has the advantage of certainty and universality of application; and it imposes upon subsequent purchasers a reasonable degree of diligence only in examining the titles to estates.”⁶ This passage was quoted with approval in a case which came before the Full Bench in Bombay.⁷ And on the same principle it has been held in Allahabad that a mortgagee must for the purpose of section 85, be deemed to have notice

1 Morland v. Cook, L. R., 6 Eq., 252.

2 Dart's Vendors and Purchasers, 6th ed., p. 520.

3 Allen v. Seckham, *supra*.

4 Agarchand v. Rakhma, I. L. R., 12 Bom., 678; explained in Balmukandas v. Moto Narayan, I. L. R., 18 Bom., 447; Dondo v. Balkrishna, I. L. R., 20 Bom., 291.

5 Chunilal v. Ramachandra, I. L. R., 22 Bom., 213.

6 Story's Equity Jurisprudence, 11th ed., p. 420.

7 Lakshmandas v. Dasrat, I. L. R., 6 Bom., 169; Shivram v. Genu, I. L. R., 6 Bom., 515; Dundaya v. Chenbasapa, I. L. R., 9 Bom., 427; Chintaman v. Ramchandra, I. L. R., 14 Bom., 506; Narayan v. Bapu, I. L. R., 17 Bom., 741.

of a prior or subsequent registered mortgage.¹ On the other hand in Madras the Court has declined to lay down the general rule that registration is equivalent to notice. The case being one in which it was considered that the plaintiffs, whom it was sought to affect with notice of a prior mortgage, had been put off inquiry as to incumbrances, it was held that the mere failure to search in the Registration office could not be said to be gross negligence within the meaning of section 78.² Similarly in Calcutta it has been held that registration is at any rate not notice for the purpose of section 81.³ "

The conditions expressed in the Contract Act under which notice to an agent is made equivalent to notice to his principal are similar to those expressed in the English Conveyancing Act, 1882, and stricter than those laid down in previously decided cases.⁴ Section 229 of the Contract Act is as follows:—

Notice to the agent is notice to the principal.

"Any notice given to, or information obtained by, the agent, provided it be given or obtained in the course of the business transacted by him for the principal shall, as between the principal and third parties, have the same legal consequence as if it had been given to, or obtained by, the principal."

According to the English cases knowledge of a fact acquired, for instance, by a solicitor in one transaction might affect his client in some other and later transaction, if there was such connection between the two transactions as to make it probable that the solicitor should have recollected the fact. Here, and now under the Conveyancing Act in England, it seems that any such probability is immaterial. Notice is not to be imputed to the client unless the business on hand is one and the same with that in which the solicitor was engaged when he acquired the knowledge. It is of course immaterial that the notice is not, in fact, conveyed to the principal. A notice to quit is none the less served on a tenant, because his agent on whom it is actually served fails to do his duty in communicating it to his employer.⁵ The agent must be presumed to have done his duty in informing his principal of matters which are material to the transaction in which he is engaged. And this presumption cannot be rebutted by proving negligence on the agent's part, or by the fact of his being interested in not making the communication

1 Janki Prasad v. Kishendat, I. L. R., 16 All., 478; Mata din v. Kazim, I. L. R., 13 All., 432, 464; Churaman v. Balli, I. L. R., 9 All., 591.

2 Shan Moun Mull v. Madras Building Company, I. L. R., 15 Mad., 268.

3 Inderdawan v. Gobind Lall, I. L. R., 23 Cal., 790.

4 See post p. 24, and Sugden's Vendors and Purchasers, 14th ed., p. 754.

5 Tanham v. Nicholson, L. R., 5 H. L., 561.

to his employer.¹ But from the general rule according to which notice is thus imputed to the principal, an exception has been allowed in cases where, independently of the fact under inquiry, there are circumstances which raise an inevitable conclusion that the notice has not been communicated to the principal.² In the cases illustrating this exception,

*Exception in case
of fraud.*

there was fraud or conduct considered by the Court as fraudulent on the part of the agent, and it was in pursuance of that fraud that he failed to communicate to his employer facts that it was latter's interest to know. In *Kennedy v. Green*,³ which may be cited as a leading case, one Bostock, a solicitor, had by means of fraud obtained an assignment of a mortgage from the plaintiff who was his client; the interest so acquired he assigned to another client, Kirby by name. It was an undisputed fact that the form of the assignment in Bostock's favour and other circumstances in the case would have excited the suspicions of any honest solicitor whom Kirby might have employed, and the question was whether Kirby could be fixed with notice of the facts which were present to the mind of his solicitor, Bostock. Lord Brougham answered this question in the negative, observing—

"It cannot be said that Kirby was fixed with all that Bostock knew. For the fraud practised by Bostock on Kirby himself was of course concealed from him; and so, may we say, would certainly be that other fraud which he practised on Mrs. Kennedy. Indeed that was only another part of the same fraud, another act of the same plot, and therefore, I think, we cannot on this account alone fix his client Kirby, any more than his other employer Mrs. Kennedy, with the knowledge of his criminal proceedings."

In *Sharpe v. Foy*,⁴ the plaintiff had advanced money upon a mortgage of land executed in his favour by Mr. and Mrs. Foy, the mortgage having been negotiated and prepared by a solicitor's clerk, Clark by name, who acted for both parties. In the suit brought on the mortgage, it became material to decide whether the plaintiff had notice of a settlement which affected the land comprised in the mortgage. The existence of this settlement had never been communicated to the plaintiff, but it had been communicated by the Foyes to Clark, who told them he would not inform the plaintiff of the settlement as it might make him nervous, and cause him to hesitate about advancing his money. In view

1 *Bradley v. Riches*, 9 Ch. D., 189.

2 See cases collected in *LeNeve v. LeNeve*; 2 White and Tudor's Leading Cases, 6th ed., p. 26.

3 3 My. & K., 699; see *Hormasji v. Mankuvarbai*, 12 Bom. H. C., 262, a similar case: no reference is made to section 229 of the Contract Act.

4 L. R., 4 Ch., 35.

of this evidence rebutting the general presumption, the Court refused to act upon it saying, "it would be an encouragement of fraud to "apply the rules of notice which were established for the safety of 'mankind to a transaction like this: it would be sanctioning a scheme "to rob a man by colluding with his solicitor;" for in the opinion of the Court there was a conspiracy between the Foyes and Clark, to keep the plaintiff in the dark. In *Cave v. Cave*¹ there 'was a similar conspiracy between Charles Cave and his brother Frederick to obtain money on a mortgage of land which they both knew not to be the absolute property of Frederick as they represented it to be. On the principle above stated, viz., that the circumstances raised an inevitable conclusion that notice had not been communicated to the mortgagee, it was held that the usual presumption did not arise. In order to bring a case within the exception, it is not enough to show that an important circumstance was not communicated. "It must be made out that distinct fraud was "intended in the very transaction so as to make it necessary for the "solicitor to conceal the fact from his client in order to defraud him."² In the case whence this passage is extracted there had been gross neglect of duty on the solicitor's part, but he was not shown to be personally interested, or to have been concerned in any fraud rendering concealment necessary. Except that in *Kennedy v. Green* there was an independent fraud committed by the solicitor before his employment by the person sought to be fixed with notice had begun, there seems to be no essential difference between the cases above cited, to which the principle of *Kennedy v. Green* was applied. With regard to all of them it may be said, as has been observed with regard to that case, that "whilst "the agent was acting as agent, he was also acting in another character, "viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, "and therefore, there is no ground on which you can presume that the "duty of an agent was performed by the person who filled that double "character."³

Although in cases resembling *Kennedy v. Green* the notice, not being obtained by the agent in the course of the business transacted by him for his principal, could not avail against the latter, other cases may arise in which, unless recourse is had to the principle just stated it must be held that the principal is affected with notice, notwithstanding the fact that he has in reality been kept in the dark by his own agent

¹ 15 Ch. D., 639.

² Rolland v. Hart, L. R., 6 Ch. D., p. 682.

³ per Fry, *J. Kettlewell v. Watson*, 21 Ch. D., p. 707

acting in collusion with the other party. In some of such cases it may be that the principle that a party cannot take advantage of his own fraud may be applied; but where there are third parties, as in *Sharpe v. Foy*, insisting on the interest which has been concealed that principle is inapplicable. In the English cases, as has been observed, the doctrine of constructive notice through the medium of an agent, proceeds on the presumption that the agent has performed his duty in making due inquiries and in communicating material facts to his principal. The scope of the agent's duty in this respect depends on the nature of his employment. Where a solicitor is employed by one purchasing property only to obtain execution of a conveyance or even to prepare it, he is not bound by the same duty of communicating particulars with regard to the title, as he would be if he were employed generally in the transaction of the business of the purchase. He may or may not know those particulars, but in the former case he is not presumed to have communicated them to his client, because he has been under no obligation to do so.¹

The terms of section 229 of the Contract Act seem to leave no room for the application of this presumption. The question under the section is not whether it was the duty of the agent to communicate a given fact or whether it was probable that he would do so, but whether, in the course of the business transacted by him as agent, he had acquired knowledge of it. If travelling beyond the scope of his agency he had become acquainted with it, notice could not be imputed to his principal; on the other hand, if in the discharge of his duty to his employer, he ought to have learnt the fact but failed to do so, it is difficult to see how, as far as section 229 is concerned, the employer can be said to have had notice. Doubtless, however, it would be held that a principal could not by pleading the negligence of his agent avoid the imputation of notice of a fact which his agent ought in the exercise of reasonable diligence to have discovered.²

When it becomes necessary to consider whether a purchaser is affected by notice of any incumbrance or other adverse right, regard must be had to the circumstances as they existed when he advanced the mortgage money, paid the price, or otherwise became purchaser. Notice acquired by him after payment is immaterial. "There is nothing more familiar than the doctrine of "equity that a man, who has *bond fide* paid money without notice of any

1 Kettlewell v. Watson, 21 Ch. D., pp. 707, 709; LeNeve v. LeNeve, 2 White and Tudor's Leading Cases, 6th ed., p. 26.

2 Compare section 3 of Conveyancing Act cited below.

"other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title, if he can, and may hold it, though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself."¹ Furthermore, notice is immaterial when attributed to a transferee who has taken from a *bonâ fide* purchaser for value without notice. The title of the latter being complete, his transferee's title is also unimpeachable.² Especially in the cases where the question of notice arises as between parties to a contract it has to be seen whether any duty to give information lies upon the person seeking to impute notice, or whether he has been guilty of any bad faith,³ for a party cannot claim the advantage of the doctrine of constructive notice if he has himself contributed to the secrecy of the transaction.⁴ The cases in which as between persons who are not parties to a contract it is sought to impute notice are generally cases in which a person having an incomplete title is claiming priority over one who has perfected his title to the same property. Such are the cases provided for in section 40 and the cases in which questions arise between holders of registered and unregistered conveyances.⁵

In the Conveyancing Act, 1882, where an attempt is made to express with certainty the law of constructive notice, the use of negative terms, such as 'wilful abstention' and 'gross negligence,' is avoided.⁶ Its provisions as to this run as follows:

1. A purchaser shall not be prejudicially affected with notice of any instrument, fact or thing, unless:—

- (i) it is within his own knowledge or would have come to his knowledge if such enquiries and inspections had been made as ought reasonably to have been made by him; or
- (ii) in the same transaction in respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such enquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

¹ *Blackwood v. Dondon Chartered Bank of Australia*, L. R., 5 P. C., p. 92; *Sugden's Vendors and Purchasers*, 13th ed., p. 753; *Taylor v. Russell*, [1891], 1 Ch., 8.

² *Dayal v. Jivraj*, I. L. R., 1 Bom., 237; *Nottingham Patent Brick, &c., Co. v. Butler*, 16 Q. B. D., 778.

³ *Hormaji v. Mankuvarbai*, 12 Bom. H. C., 262; *Morgan v. The Government of Haiderabad*, I. L. R., 11 Mad., 419.

⁴ See note 3 to section 54 and note to section 58.

⁵ 45 & 46 Vict. c. 39, section 3.

2. This section shall ~~not~~ exempt a purchaser from any liability under or from any obligation to perform or observe any covenant, condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately: and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

Thus the question now to be asked in English Courts is, whether the purchaser has made the inquiries and inspections which he ought reasonably to have made.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872: and sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall be read as supplemental to the Indian Registration Act, 1877.¹

Enactments relating to contracts to be taken as part of Act IX of 1872.

Commentary.

The Law Commissioners in their Report, dated 15th November 1879, say² :—

“ We would declare that all chapters and sections of the (Transfer of Property) Bill which relate to contracts should be taken as part of the Contract Act, 1872. “ When the body of substantive civil law enacted for India is re-arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the Legislature, the chapters on Sale, Mortgage, Lease and Exchange contained in the present Bill will probably be placed in close connection with the rules contained in the Contract Act. But till then they may fitly be left in a law containing what the Contract Act does not contain, namely, general rules regulating the transmission of property between living persons.”

¹ The last sentence was added by the Amendment Act—Act XII of 1885—section 3; see *Makhan Lal v. Bunku Behari*, I. L. R., 19 Cal., 623, *Vairanada v. Miyakan*, I. L. R., 21 Mad., 109, and notes 2 and 3 to section 54.

² See page 29.

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A).—*Transfer of Property whether moveable or immoveable.*

5. In the following sections “transfer of property”

“Transfer of property” defined. means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and “to transfer property” is to perform such act.

Commentary.

The object of the Act is to regulate the transfer of property from one living hand to another as the Indian Succession Act regulates its transmission after the owner's death. In using the term ‘living person’ the Legislature, it is conceived, did not intend to exclude from the operation of the Act artificial persons, *e.g.*, corporations, or the Government. The term ‘transfer of property’ is a general one and includes, besides a conveyance or assignment of a contractual character, the exercise of a power of appointment under a settlement.¹ A transfer under the Act has to be distinguished from an involuntary transfer which is effected in execution of a decree.² From the definition of ‘immoveable property’ in the General Clauses Act, 1868, and from the terms of the following section it may be inferred that the term ‘property’ is used in its most general significance. Section 54 shows that property may be tangible or intangible, and unless a wide denotation is given to the term the general provisions in this chapter (*e.g.*, sections 38, 41, 43) would be inapplicable to mortgages which consist in a transfer of an interest only in property (section 58). Again, in the chapter on mortgage a lease is treated as property (sections 64, 71, 72). These considerations lend support to the opinion expressed by Mahmood, J., in considering whether a second mortgagee is at liberty to cause the property to be sold subject to the prior mortgage. In his view, recently adopted by a divisional Court in Calcutta,³ the equity of redemption is property “within the

1 *Joshua v. Alliance Bank of Simla*, I. L. R., 22 Cal., 202.

2 *Dinendronath v. Ramkumar*, I. L. R., 7 Cal., 118; see note to section 52 and note 8 to section 55.

3 *Kanti Ram v. Kutubuddin*, I. L. R., 22 Cal., 33; *Beni Madhub v. Somendra*, I. L. R., 23 Cal., 795; *Muthu Vijaya Raghunatha v. Vencatachellam*, I. L. R., 20 Mad., 35.

meaning of the chapter and may be sold at the instance of the second mortgagee. The contrary view was maintained by the other members of the Allahabad Court who consider that 'property' as the term is used in Chapter IV means the actual physical property and does not include

Conveyance of property in future. an interest merely in such property.¹ It may be assumed that the words relating to the conveyance of property in future refer to estates in reversion or remainder, since this construction has been put on similar words used in the Indian Registration Act, 1871.² Although a transfer of property, whether in present or in future, must be made to a living person, for otherwise the anomaly would result of property vested in no living person, an interest can be created in favour of persons yet unborn, and the limits within which this may be done are prescribed by sections 13, 14, 15, 16, 20.

6. Property of any kind may be transferred, except
 What may be as otherwise provided by this Act or by
 transferred. any other law for the time being in force:

(a) The chance of an heir-apparent succeeding to an [1] estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature cannot be transferred.

(b) A mere right of re-entry for breach of a condition [2] subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the [3] dominant heritage.

(d) An interest in property restricted in its enjoyment [4] to the owner personally cannot be transferred by him.

(e) A mere right to sue for compensation for a fraud [5] or for harm illegally caused cannot be transferred.

(f) A public office cannot be transferred, nor can the [6] salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military and civil pensioners [7] of Government and political pensions cannot be transferred.

1 *Muta Din v. Kazim*, I. L. R., 13 All., 432, 460, 472.

2 *Nana bin Lakshman v. Anant Babaji*, I. L. R., 2 Bom., 353,

- [8] (h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee. •
- [9] (i) Nothing in this section shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.¹

Commentary.

Cases illustrating the meaning of 'transfer of property' will be found in note 1 to section 58. In addition to the exceptions provided for in this Act or in other enacted law are those created by Muhammadan, Hindu or Buddhist law, for the present chapter does not affect those laws.

The first requisite of a valid transfer is that it should operate upon a subject-matter in existence. Whether the property concerned is moveable or immoveable there can be no transfer of it unless it is in existence at least potentially, as the property of the grantor.² And so it has been held that an hypothecation of indigo crops that may be grown in the future on certain land is not within the purview of the Act.³ But a conveyance of non-existent property, or of property which is not capable of specification, though it cannot operate as an immediate alienation, may, when made for valid consideration, be valid as a contract; and when the objects to which it refers come into existence and are capable of being identified,⁴ "equity taking as done that which ought to be done fastens upon the property, and the contract to assign thus becomes a complete assignment."⁵ Thus the Privy Council said:—"How can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed '*in futuro*,' and upon the happening of a

1 Clause (i) was added to the section by the Amendment Act—Act III of 1885—section 4.

2 *Petch v. Tutin*, 15 M. & W., 110; *Clements v. Matthews*, 11 Q. B. D., 808; *Benjamin on Sale*, 3rd ed., p. 70.

3 *Misrlal v. Mozhar*, I. L. R., 13 Cal., 262; *Palaniappa v. Lakshmanan*, I. L. R., 16 Mad., 429; *Bansidhar v. Sant Lal*, I. L. R., 10 All., 133.

4 *Cumberland Union Banking Co. v. Maryport Hematite Co.*, [1892] 1 Ch., 415.
5 *per Jessel*, M. R., in *Collyer v. Issacs*, L. R., 19 Ch. D., p. 351.

"contingency; of which the purchaser may claim a specific performance, "if he comes into Court showing that he himself has done all that he "was bound to do."¹ It may be that the description of the property is vague or general at the date of the transaction. That is immaterial, provided that the property is capable of identification when it comes into existence and the transferee's right is to be enforced.² The leading case on this subject is *Holroyd v. Marshall*,³ where it was held that the grantee of a bill of sale, assigning to him machinery on the grantor's premises and other machinery that might be added to or substituted for it, was entitled as against an execution-creditor of the grantor to machinery brought on to the premises after the giving of the bill of sale, as well as the old machinery. Immediately on the new machinery being set up in the mill, without any further action being taken, the grantor became a trustee for the grantee in respect of it; and he could have been restrained by an injunction at the instance of the grantee from removing it. An agreement to make a gift is not such a contract as above described, therefore it cannot affect property subsequently coming into existence. On the principle enunciated in *Holroyd v. Marshall* an assignment may be made of moneys to become due in the future and will operate upon such moneys when they fall due. A bill of sale, executed by a manufacturer and comprising, among other things, all the book debts which might become due and owing during the continuance of the security, was thus held to pass the beneficial interest in a debt which came into existence after the assignment.⁴ As such an assignment when made for value is valid against the assignor, so it avails also against his creditors or assignee in bankruptcy, so far at least as regards moneys which fall due before the date of bankruptcy.⁵ Under the Judicature Act in England a written assignment, followed by the prescribed notice,

1 *Rajah Sahib Prahlad v. Baboo Budhu*, 2 Beng. L. R. P. C., 117; s. c., 12 Moo. I. A., 275; see also *Tara Soondaree v. Collector of Mymensingh*, 13 Beng. L. R., 495; and *Bhobosondree Dassiah v. Issur Chunder Dutt*, 11 Beng. L. R., 36 (in which the above passage was quoted) where the principal question was 'the effect of a deed, whether it operated as present transfer of the property or only as an agreement to transfer it upon certain contingencies which did not happen.'

2 *Tailby v. Official Receiver*, 13 App. Cas., 523, overruling *Tadman v. D'Epineuil*, 20 Ch. D., 758.

3 10 H. L. C., 191.

4 See also *Lazarus v. Andrade*, 5 C. P. D., 318, distinguished in *Reeves v. Barlow*, 12 Q. B. D., 436; *Clements v. Matthews*, 11 Q. B. D., 808; *In re Clarke, Coombe v. Carter*, 35 Ch. D., 102. Other cases of the same class with *Holroyd v. Marshall* are *Lindsay v. Gibbs*, 3 DeG. & J., 690, in which the future cargo of a ship, and *Printing, &c., Company v. Sampson*, L. R., 19 Eq., 462, in which future patent rights were held to be assignable in equity.

5 *Official Receiver v. Tailby*, 13 App. Cas., 523

6 *In re Davis & Co.*, 22 Q. B. D., 193

effectually passes the property, whether or not there is valuable consideration for the assignment, and it is immaterial that notice is given after the death of the assignor.¹

The language cited above from the judgment of the Privy Council has been used as authority for the position, which *Transfer without possession.* for other reasons also the High Court of Bombay for some time maintained, that there could be no transfer of property by a Hindu or Muhammadan owner not in possession of the same actually or constructively, and that therefore the person taking from such an owner could not sue in ejectment. This rule, to which, however, several exceptions were admitted, was applied by the High Court of Bombay in numerous cases down to the year 1885², and reliance was placed on those cases in a Bengal case heard on appeal before the Judicial Committee, in which it was contended that the gift by a Hindu which was the basis of the plaintiff's title was invalid, inasmuch as the donor was out of possession and no possession was ever given to the donee. The validity of the gift was disputed by a third party claiming adversely to the donee and to the donor, who was made a defendant and affirmed the gift. The Judicial Committee reviewed the Bombay cases and explained the decision of the Committee in the cases above cited, by showing that there the question was whether the plaintiff was under the terms of a contract of sale entitled to possession. "In this case," it was said, "the appellant is under the terms of the gift, and according to the construction which their Lordships have put upon the *ikramana*, entitled to possession, and their Lordships see no reason why a gift or contract of sale of property, whether moveable or immoveable, if it is not of a nature which makes the giving effect to it contrary to public policy, should not operate to give to the donee or purchaser a right to obtain possession. This appears to be consistent with Hindu law. On the principle contended for by the respondent, so long as he prevents the true owner from taking possession, however violently or wrongfully, that owner cannot make any title to a grantee."³ This decision, which has since been followed in Bombay⁴ so far as

¹ Walker v. Bradford Old Bank, 12 Q. B., 511.

² The cases are collected in Lakshmandas v. Dasrat, I. L. R., 6 Bom., 175, and the exceptions are there stated, p. 176; see also Baisuraj v. Dalpatram, *ib.*, 380, and Vasudev v. Tatia Narayan, *ib.*, 387. As to the rule in connection with mortgages, see note 2, section 58; and in connection with gifts see note to section 123 and in connection with leases see Pitchakutti v. Kamalla, 1 Mad. H. C., 153, and note to section 105.

³ Kalidas v. Kanhaya Lal, I. L. R., 11 Cal., 121; s.c. I. R., 11 I. A., 219.

⁴ Ugarchand v. Madapa, I. L. R., 9 Bom., 324; see as to Muhammadans, Meher-ali v. Tajudin, I. L. R., 13 Bom., 156.

Hindus are concerned, brings the law as administered by the Courts of that Presidency into harmony with the rulings in Bengal and Madras.¹

Note 1. (a) Possibilities of succession and the like are not susceptible of alienation at common law.² But by a doctrine similar to that illustrated in *Holroyd v. Marshall*, Courts of equity have long upheld contracts relating to expectancies.³ They do not directly effect a transfer of the property, but merely give rise to a right to which effect may be given by a decree for specific performance.⁴ Thus assignments for value of the expectancy of an heir-at-law⁵ and the interest which a person expected to derive under the will of a living person⁶ have both been upheld in Courts of equity. It has been held in Calcutta that the reversionary interest of a Hindu, contingent on the death of a widow, may be lawfully assigned so that the assignee can claim the property on the widow's death,⁷ but in Bombay it has been held that such an interest cannot be attached.⁸

Note 2. (b) A right of re-entry presupposes in the person asserting it an interest in the land to which it relates. A lesser therefore, having the right to re-enter on breach of covenant by his lessee, may transfer the reversion, passing with it the right of re-entry, but cannot transfer

1 *Lokenath v. Jugobundhoo*, I. L. R., 1 Cal., 297; *Narain Chunder v. Dataram*, I. L. R., 8 Cal., 597; *Modun Mohun v. Fattarunnissa*, I. L. R., 13 Cal., 297; *Virabhadra v. Hari Rama*, 3 Mad. H. C., 38; *Vasudeva v. Narasamma*, I. L. R., 5 Mad., 6; *Ramasami v. Marimuttu*, I. L. R., 6 Mad., 404.

2 *In re Parsons*, 45 Ch. D., 51.

3 See *Warmstroy v. Tanfield*, 2 W. & T. L. C., 6th ed., p. 794; *Carleton v. Leighton*, 3 Mer., 667. But see *per Campbell, C. J.*, in *Hanks v. Palling*, 6 E. & B., 669: "there is nothing illegal in selling the chance of getting the rent... the purchaser took the risk of the rent not being paid." See also *Cook v. Field*, 15 Q. B., 460, in which the Court supported as valid a contract to sell an estate if it should be devised to the vendor by a person then living; and *Ram Tubul Singh v. Bissagar*, 15 Beng. L. R., 208, s.c. L. R., 2 I. A., 131; *Benjamin on Sale*, 3rd ed., p. 81. In England future interests and possibilities when coupled with an interest in real estate, may be assigned by deed under 8 & 9 Vic. c. 106, section 6; see *Jenkins v. Jones*, 9 Q. B. D., 128.

4 See as to the special equitable rules applicable to such cases, *Srimati Kamin v. Kali Prosunno*, L. R., 12 I. A., 215; *Gitabai v. Balaji Koshav*, I. L. R., 17 Bom., 232.

5 *Hobson v. Trevor*, 2 P. Wms., 191; and see *per Phear, J.*, in *Ram Chandra v. Dharmo*, 7 Beng. L. R., 345.

6 *Hinde v. Blake*, 3 Beav., 235; *Flower v. Buller*, 15 Ch. D., 665.

7 *Brahmadeo v. Harjan Singh*, I. L. R., 25 Cal., 778.

8 *Anandibai v. Rajaram*, I. L. R., 22 Bom., 984. The words used in section 266 (b) of the Civil Procedure Code are "an expectancy of succession by survivorship or other merely contingent or possible right or interest." See *Umces Chunder v. Zahun Fatima*, I. L. R., 18 Cal., p. 177.

that right by itself.¹ The principle on which this rests may be compared with that which prevents a vendor of land from imposing a restriction upon its enjoyment otherwise than for the purpose of the more beneficial enjoyment of other land belonging to him.² As with a covenant restricting the ordinary enjoyment of land, so with a right of re-entry, the right can only reside in the person having an interest in it by reason of his relation to the land. Such a right cannot exist for the personal benefit of one who has no concern with the land. Similarly where the lender of goods on hire has reserved to himself power to enter and take the goods on default being made by the borrower, that power cannot by itself be transferred to a third person.

Note 3. (c) As an easement according to the Indian Easements Act³ implies a dominant and a servient heritage, it follows that it cannot be severed from the dominant heritage. In other words, there is for the purposes of that Act no such thing as an easement in gross.

Note 4. (d) It stands to reason that a person cannot alienate an interest restricted in its enjoyment to himself. If a house is lent to a man for his personal use, or allotted to him by the head of his family if he is a Hindu, obviously he cannot transfer his right of enjoyment to another. As instances of inalienable property may be mentioned lands in Bengal held on *ghatwali* tenure which are neither divisible nor transferable,⁴ lands attached to the office of karnam in Madras,⁵ and the emoluments of a religious office.⁶ The right of occupancy, which a ryot might acquire under section 6 of Beng. Act VII of 1869, is also inalienable. By ceasing to hold or cultivate the land himself, the ryot is deemed to have abandoned his right.⁷ Similarly, in cases where the right of pre-emption has been in question it has been held that the right is purely personal and cannot be transferred to a stranger. "The very object

¹ *Vaguram v. Rangayyengar*, I. L. R., 15 Mad., 125; compare *In re Davis*, 22 Q. B. D., 194; *Smith v. Paokhurst*, 3 Atk., 139; and *Conveyancing and Law of Property Act*, section 10, sub-section 1.

² See section 11.

³ *In re Davis & Co.*, 22 Q. B. D., 194.

⁴ Act V of 1882.

⁵ *Rajah N'Imoni v. Bakranath*, L. R., 9 I. A., 104; *s.c.* I. L. R., 9 Cal., 187; *Rajah Lelanund v. Government of Bengal*, 6 Moo. I. A., 101.

⁶ *Seshaiya v. Gouramma*, 4 Mad. H. C., 336.

⁷ *Narasimma v. Anantha*, I. L. R., 4 Mad., 391.

⁸ *Naranda Narayan v. Ishan Chandra*, 13 Beng. L. R., 274; *Dwarka Nath v. Hurrish Chander*, I. L. R., 4 Cal., 925; *Narain Roy v. Opnit*, I. L. R., 9 Cal., 304; *Srishteedhar v. Mndan Sirdar*, *ib.*, p. 648. So under Act XVIII of 1873 (N. W. P.) *Gopal Pandey v. Badri Nath*, I. L. R., 5 All., 121; *Durga v. Jhinguri*, I. L. R., 7 All., 511, 578.

"and basis of the pre-emptive right is to prevent the introduction of strangers as co-sharers in the property; and the right is enforced on the hypothesis that the introduction of a stranger causes inconvenience to the pre-emptive co-sharers. . . It is a transient right in its very conception and nature, and being a personal privilege of the pre-emptor, cannot be made the subject of sale or bargain of any other kind."¹ It follows that the stranger to whom the pre-emptor has affected to transfer his right cannot bring a suit to enforce it. And similarly a decree obtained by a pre-emptor cannot be assigned to a stranger.² It may in some instances be difficult to mark the distinction between holdings to which this clause may apply and cases falling under section 10, in which it is attempted to fetter the transferee's power of alienation. In a recent case, in which the usufruct of certain land was assigned by deed to a widow for her maintenance with this condition that she was not "to mortgage, make a gift of, sell or assign the land in any way to any person," it was ruled that her interest could not be sold in execution of a decree against her.³

Note 5. (e) In this clause, as well as in Chapter VIII, it is assumed

Right to sue, when assignable. that actionable claims or rights to sue are, as a general rule, transferable. The clause states one of the exceptions from that rule recognized in the English cases. Formerly the assignment of the benefit of a contract was not recognised at common law, and was even regarded as champertous. In equity however the assignee might sue in his own name, and even obtain specific performance of a contract,⁴ as he may now do under the provisions of the Judicature Act.⁵ Rights of suit, when incident to the ownership of the property, may be transferred with it, and so the fact that the owner of property is not in possession does not render his transfer to another invalid. Although the transaction may be of a speculative character, the transferee whether of an equity or other interest in land may nevertheless acquire a good title and sue accordingly.⁶ But the sale of a mere right to sue is bad. As was observed by Sargent, J., after referring to the English cases⁷

"The real test in cases of this nature is whether the transaction was a *bonâ fide* purchase of the matter in dispute, or one for the purpose of maintaining or

1 *Rajjo v. Lalman*, I. L. R., 5 All., p. 183.

2 *Ram Sahai v. Gaya*, I. L. R., 7 All., 107, 109.

3 *Diwali v. Apaji*, I. L. R., 10 Bom., 342; see note to section 10.

4 *Story Eq. Jur.*, § 1057.

5 38 & 39 Vic. c. 77.

6 *Lokenath v. Jugobundhoo*, I. L. R., 1 Cal., 297; *Gopal v. Gangaram*, I. L. R., 14 Bom., 78.

7 *Goonidas v. Lakshmidas*, I. L. R., 3 Bom., 402; *James v. Kerr*, 40 Ch. D., 449.

"proceeding with litigation, and where such is the case Courts of law and equity will treat the transaction as an infringement of the law against champerty and maintenance, and as having neither validity between the parties thereto, nor conferring any right of action against third persons."

In the case whence this passage is extracted, the subject-matter of the assignment was the right of suing to have set aside on the ground of fraud a compromise that had been effected between the liquidator of a company and a person indebted to it. It was held that, inasmuch as the assignment was made with a view to litigation, which would not otherwise have been undertaken, the suit of the assignee could not be maintained.¹ It has further been held in this country that the mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree cannot be sold.² In a case in which the rule of the present clause was applied, Turner, L.J., declined to say that there are no cases in which a purchaser who has completed his contract may be entitled to impeach a title founded on fraud committed upon his vendor, but added:—"I do not hesitate to say that in my opinion the right to complain of a fraud is not a marketable commodity, and that if it appears that an agreement for purchase had been entered into for the purpose of acquiring such a right, the purchaser cannot call upon this Court to enforce specific performance of the agreement. Such a transaction if not in strictness amounting to maintenance savours too much of it for this Court to give its aid to enforce this agreement."³ It appears from an elaborate judgment of the Privy Council, in which all the authorities are collected, that the English laws of maintenance and champerty are not of force as specific laws in India. "But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, effect ought not to be given to them."⁴ And on this

1 See *Prosser v. Edmunds*, 1 Y. & C. (Ex.), 481; *Hill v. Boyle*, L. R., 4 Eq. 260; *Moreswar v. Kushaba*, I. L. R., 2 Bom., 248; *Tarasoondaree v. Collector of Mymensingh*, 13 Beng. L. R., 495; *Tarachand v. Suklal*, I. L. R., 12 Bom., 554.

2 *Pragil Lal v. Futeh Chand*, I. L. R., 5 All., 207; and see *Story Eq. Jur.*, § 1040 (h).

3 *De Hoghton v. Money*, L. R., 3 Cl., p. 169.

4 *Ram Coomar Coondoo v. Chunder Kanto Mookerjee*, 2 App. Ca., 166, L. R., 4 I. A., 23; see also *Ahmedbhoy Habibbhoy v. Vulleebhoy Cassumbhoy*, I. L. R., 8 Bom., p. 323; *Chunni Kuar v. Rup Singh*, I. L. R., 11 All., 57; *Husain Baksh v. Rahmat Husain*, *ib.*, 128; *Loke Indar Singh v. Rup Singh*, *ib.*, 118; *Raja Mokham Singh v. Raja Rup Singh*, I. L. R., 15 All., 352; *Raghunath v. Nil Kanth*, I. L. R., 20 Cal., 843.

principle the Judicial Committee held that a fair agreement to supply funds for the litigation of a claim in consideration of having a share in the property if recovered, ought not to be regarded as illegal. The clause is so narrowly worded, referring to suits for compensation only, that it would not cover such a case as that stated above.¹

With this clause may be compared section 266 (e) of the Civil Procedure Code. The right of a person under a decree entitling him to a share of land has been held to be property within the meaning of that section.² A decree for money is liable to attachment although the suit to recover it may not be transferable as property.³

As to the transfer of actionable claims in general, see Chapter VIII.

Note 6. (f) Alienations of public offices or appointments, or the salary, fees or emoluments of office, in many cases prohibited by statute, are also void at common law.⁴ "Where the law," said Page-Wood V.C., "assigns fees to an office, it is for the purpose of upholding the dignity and performing properly the duties of that office: and the policy of the law will not allow the officer to bargain away those fees to the appointor or any one else."⁵ Apart from custom⁶ the office of trustee of a religious institution is inalienable,⁷ although a trustee may in certain cases delegate his duties to a paid agent;⁸ property attached to the office for the maintenance of the holder stands on the same footing.⁹ As to exemption from attachment of salaries of public officers, see Civil Procedure Code, section 266 (h). As to property devoted to charitable purposes, see section 17.

1 *Goculdas v. Lakshmidas*, I. L. R., 3 Bom., 402.

2 *Rudra Perkash v. Krishna*, I. L. R., 14 Cal., 241.

3 *Gholam Mohamed v. Indra Chand*, 7 Beng. L. R., 318.

4 Agreements which are void on this account are treated of in section 3 of the Indian Contract Act; see also Benjamin on Sale, 3rd ed., p. 507.

5 *Corporation of Liverpool v. Wright*, 28 L. J. N. S., Ch. 868; *Norton v. Arbuthnot*, 3 Moo. I. A., 435.

6 *Mancharam v. Pranshankar*, I. L. R., 6 Bom., 298; *Rangasami v. Runga*, I. L. R., 16 Mad., 146.

7 *Keyake-Ilata Kotel v. Yadattil*, 3 Mad. H. C., 380; *Rajah Vurma Valia v. Ravi Vurma*, I. L. R., 1 Mad., 235; s.c. I. L. R., 4 I. A., 76; *Narasimma v. Anantha*, I. L. R., 4 Mad., 391; *Wahid Ali v. Ashruff*, I. L. R., 8 Cal., 732; *Kuppa v. Dorasami*, I. L. R., 6 Mad., 76; *Sabbarayudu v. Kotagya*, I. L. R., 15 Mad., 389; *Rangasami v. Ranga*, I. L. R., 16 Mad., 146.

8 *Krishnamacharu v. Rangacharu*, I. L. R., 16 Mad., 73.

9 For illustration see cases as to *ghatwali* tenure collected in *Anundo v. Kali*, I. L. R., 10 Cal., 677; as to service vatams, Bombay Act III of 1874, and *Radhabai v. Anantrav*, I. L. R., 9 Bom., 198.

Note 7. (g) This clause goes beyond the English law as declared by Lord Eldon in *Davis v. Duke of Marlborough*.¹ "A pension for past services," he said, "may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable." The pay or half pay of a military officer is not a legal subject of sale either by English law or by this section;² nor could such pay be attached.³ By the Army Act, 1881, section 141, the pension of an officer, though given for past services, is made inalienable and cannot be seized by a creditor by execution or other process of law.⁴ Salaries or pensions not given for the performance of public services are freely assignable.⁵ See also Civil Procedure Code, section 266 (g).

Note 8. (h) (1). Of things physically incapable of being owned or alienated the air, the light, the ocean and running water may be given as instances. In their natural state they belong to nobody and are therefore called '*res communes*.' At the same time portions of them may be appropriated, and air and water may be sold. Other things are also classed as '*res extra commercium*,' not on account of their intrinsic nature, but because they have been artificially brought into the category of things which cannot freely be bought and sold.⁶ For instance, things which have been dedicated to public or religious purposes, crown jewels or heirlooms.

(h) (2) This and the next clause seem rather out of place in a section which has to do with the description of things which may or may not be transferred. It is not clear what effect is to be given to the proposition that a transfer cannot be made for an illegal purpose. While it is true that a transfer for an illegal consideration is void, it is otherwise when a person making a transfer has an illegal purpose and attaches a condition to his transfer accordingly. In such case the condition being

1 1 Sw., 74: compare the judgment of Parke, B., in *Wells v. Foster*, 8 M. & W., 149. See the Indian Pensions Act—Act XXIII of 1871; and in case of the bankruptcy of the grantee of a pension, see *ex parte Huggins*, 21 Ch. D., 85, in which it was held that the pension was 'property' within the meaning of the Bankruptcy Act of 1869. *In re* petition of Shrewsbury, 1 L. R., 10 Bom., 313; as to Act of 1883, see *In re Saunders*, [1895] 2 Q. B., 424.

2 Flarty v. Odum, 2 Durnford & East, 681; *Lidderdale v. Montrose*, 4 ib., 248.

3 *Apthorpe v. Apthorpe*, L. R., 12 P. D., 192.

4 *Lucas v. Harris*, 18 Q. B. D., 127; *Crowe v. Price*, 22 Q. B. D., 429.

5 *Feistel v. King's College*, 10 Beav., 491.

6 2 Stephens' Commentaries, 5th ed., p. 239; *Lindley's Thibant*, p. 136; *Seshaiya v. Gouramma*, 4 Mad. H. C., 336; *Rajah Yarna Valia v. Kottayath*, 7 Mad. H. C., 210; as to the circumstances justifying the sale of debutter property, see *Konwar Doorga-nath v. Ram Chander*, 1 L. R., 2 Cal., 347; s.c. L. R., 4 I. A., 58.

illegal is void, and no effect can be given to his purpose. But the transfer remains good; the transferee cannot be divested of the property.¹ And generally it has been held that, when once there is a completed transfer of the property, the transferor cannot, by alleging his own illegality of purpose and intention, reclaim the thing transferred. "A completely executed transfer of property, though originally made upon an unlawful consideration or in pursuance of an unlawful agreement, is afterwards valid and irrevocable both at law and in equity."²

The cases in which a transfer for an illegal purpose is void in the sense that the transferor can recover the property are stated in section 84 of the Trusts Act, which is as follows:—

"Where the owner of property transfers it to another for an illegal purpose and "such purpose is not carried into execution, or the transferor is not as guilty as the "transferee, or the effect of permitting the transferee to retain the property might "be to defeat the provisions of any law, the transferee must hold the property for "the benefit of the transferor."³

To illustrate the principle of the section reference may be made to a case in which Innes, J., held that the plaintiff who had conveyed her property to the defendant by a document, intended to defeat the right of escheat and therefore against public policy, could not recover it, inasmuch as the parties were in *pari delicto*.⁴

(h) (3) Among the persons legally disqualified are the judge, pleaders and other persons mentioned in section 136 in connection with the cases for which provision is there made.

Note 9. (i) This clause is identical with the proviso in clause (j) of section 108, and was inserted by the Amendment Act to obviate any doubt which might arise owing to the fact that that section does not primarily apply to leases for agricultural purposes.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his

Persons competent to transfer.

¹ Ram Sarup v. Bela, I. L. R., 6 All., 318; s.c. L. R., 11 I. A., 44; see Symes v. Hughes, L. R., 9 Eq., 475; and see Tamarasherri Sivithri v. Vasudevan, I. L. R., 3 Mad., 215.

² Ayerst v. Jenkins, L. R., 16 Eq., 375; Lachmi v. Wilayti, I. L. R., 2 All., 433; Bataji v. Krishna, I. L. R., 18 Bom., 373; Rangammal v. Venkatachari, I. L. R., 18 Mad., 378; Sham Lal v. Amarendro, I. L. R., 23 Cal., 461: see note to section 53.

³ See Chonvirappa v. Puttappa, I. L. R., 11 Bom., 708, where cases are collected; Rangammal v. Venkatachari, I. L. R., 20 Mad., 323.

⁴ Tamarasherri Sivithri v. Vasudevan, I. L. R., 3 Mad., 215.

⁵ See section 117.

own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Commentary.

Competency to contract¹ is by this section the first condition of competency to transfer property, as by section 7 of the Indian Trusts Act—Act II of 1882—it is the first condition of competency to create a trust. It is to be noted that the section does not say that a transfer by an incapable person is void. On the contrary, it has been held that a sale by an infant is voidable only.² The transferor must, further, have title to the property which he transfers or authority to dispose of it, as for instance as an agent or as the grantee of a power—*e.g.*, certain mortgagees under section 69. Section 35 provides for a case in which an attempted transfer of property, which the intending transferor has no right to transfer, operates as giving rise to a case for election; and under sections 41 and 43 a certain effect is given to professed transfers by ostensible owners and by persons who acquire an interest in the property in question after the date of the transaction. Further, the property of which the transfer is made, must satisfy the requirements of section 6 and if the transfer is made subject to conditions, they must comply with the provisions laid down in the present chapter.

- [1] **8.** Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.
- [2] Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;
- [3] and, where the property is machinery attached to the earth, the moveable parts thereof;
- [4] and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer,

¹ Contract Act, section 11.

² Mahamed Arif v. Saraswati, I. L. R., 18 Cal., 259.

and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable [5] claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property [6] yielding income, the interest or income thereof accruing after the transfer takes effect.

Commentary.

Note 1. The first paragraph of this section, which may be said generally to confirm a previously existing rule of law, corresponds with the first clauses of section 63 of the English Conveyancing and Law of Property Act, 1881,¹ which runs as follows:—

(1) "Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim and demand which the conveying parties respectively have in, to or on the property conveyed or expressed or intended so to be, or which they respectively have power to convey in, to or on the same."

(2) "This section applies only if and as far as a contrary intention is not expressed in the conveyance and shall have effect subject to the terms of the conveyance and to the provisions therein contained."

And the next three paragraphs are similar to section 6 of the same statute.

In a recent case not under the Act, the rule of law is stated by the Privy Council to have been that indefinite words of gift were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument to gather the intention: and the words "I put a stop to my interest (in those taluqs) and withdraw my enjoyment thereof, and I make them over to you" must, it was held, be read with the words which preceded them in the instrument under consideration—"in order that you may perform those religious ceremonies," &c. "It is a question to be decided when it arises," it was added, "whether the framers of the (Transfer of Property) Act have not consciously or otherwise, so expressed themselves as to lay down a more positive rule in favour of absolute gifts."² It is

¹ 44 & 45 Vic. c. 41.

² Kalidas v. Kanhaya Lal, 11 Cal., p. 131; L. R., 11 I. A., p. 288; see Iekhray v. Kunhya, 1. L. R., 3 Cal., 210; s.c. L. R., 4 I. A., 223; Ugarchand v. Madapa, 1. L. R., 9 Bom., 324; Mahomed Buksh v. Hosseini Bibi, 1. L. R., 15 Cal., 702; and Mayne's Hindu Law, § 365.

clear that if the words of conveyance are unqualified the grantor cannot claim to have reserved any rights.¹ Although, generally according to Hindu law, a gift of property, made without express words of inheritance, conveys an absolute estate,² it is not so where the donee is a woman taking from her husband. Where property is given by a Hindu to his wife, it must ordinarily be taken with reference to their personal law that the intention was to confer on her nothing more than a woman's estate.³ A lease stands on a different footing. However, even use of the term 'mukurari istimrari' is not conclusive to show that a permanent lease was intended; but regard must be had to the terms of the instrument and all the circumstances indicative of the intention of the parties.⁴ When the origin and purpose of the tenancy are known and the tenant has ceased to hold the land for that purpose, the mere fact of the long continued possession at a low fixed rent affords no ground for an inference that a permanent tenure has been agreed upon.⁵

Note 2. The legal incidents of an interest in property include⁶ of course the rights and liabilities attached to it; as for instance in certain cases the right of pre-emption,⁶ and the rights referred to in sections 65 (2), and 108 (c). Where the transfer is by way of lease, section 108 shows what are the rights arising from the operation of the transfer by necessary implication in the absence of express contract. ➤

The term 'easement' is defined by section 4 of the Indian Easements Act and the two Acts must, it is presumed, be read together.⁷ Easements actually existing at the date of the transfer must, if they are to continue to exist, pass with the

¹ Tarachand v. Jakshman, I. L. R., 1 Bom., 91.

² Anundomohey v. E. I. Co., 8 Moo. I. A., 43; Tagore v. Tagore, 9 Beng. L. R., 377.

³ Mahomed Shunsool v. Shewarkram, L. R., 2 I. A., 7; Koonjbehari v. Premchand, I. L. R., 5 Cal., 684; Kunhia v. Mahin, I. L. R., 10 All., 495; see however, Ram Narain v. Pearay, I. L. R., 9 Cal., 830; Bhujaanga v. Ramayamma, I. L. R., 7 Mad., 387; Ramasami v. Papayya, I. L. R., 16 Mad., 466, where the gift being to a married daughter the case was distinguished.

⁴ Lalchand v. Takur Munoranjan, 13 Beng. L. R., 124; Sheopershad v. Kally Dass, I. L. R., 5 Cal., 543; Tulshi Pershad v. Ramnarain, I. L. R., 12 Cal., 117; Rakhal Das v. Dinomoyi, I. L. R., 16 Cal., 652; Rajaram v. Narasinga, I. L. R., 15 Mad., 199; as to burden of proof, see Thiagaraja v. Giyana Sambandha, I. L. R., 11 Mad., 77; Daulata v. Sukharam, I. L. R., 14 Bom., 392.

⁵ Secretary of State v. Inghieswar, I. L. R., 16 Cal., 223; see Narayanbhat v. Davlata, I. L. R., 15 Bom., 647.

⁶ Bhajan v. Mushtak, I. L. R., 5 All., 325.

⁷ See Wutzler v. Sharpe, I. L. R., 15 All., 270.

dominant tenement; and so it is provided by section 19 of the same Act, whether the transfer is by act of parties or by operation of law, unless a contrary intention appears. Under the Easements Act an easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages (section 46). It is suspended only when the dominant or servient owner becomes entitled to the heritage of the other for a limited interest (section 49). In the latter case it revives if the cause of suspension is removed, unless, being other than a necessary easement, it is extinguished by non-enjoyment under section 47 (see section 51). In the former case there is on the unity of ownership ceasing a revival of necessary easements only (section 51). Easements of necessity, *e.g.*, a right of way to a field otherwise inaccessible, are defined and illustrated in section 13 of the same Act.

Apart from easements properly so called, there are other rights in the nature of easements which are called into existence by a severance of one property into two parts, on the owner selling one part and reserving to himself the other, or selling it in two parts to different persons at the same time.¹ For these provision is made in section 13 of the Easements Act. A man, who sells one of two adjoining houses or plots of land belonging to him, impliedly gives to his purchaser such rights over the property retained, and reserves to himself such rights over the property sold, as are necessary for the enjoyment of each. In other words, each of them is entitled to any easements of necessity, *e.g.*, a right of way which is indispensable for the enjoyment of the land. Besides easements of necessity, the transferee of one of two houses or plots also acquires, and the transferor retains, such rights as are necessary for enjoying their respective properties as theretofore enjoyed and are continuous and apparent. Of this class of rights the right to receive light without obstruction or the right to a flow of water is an instance. A man who sells a house and reserves an adjoining piece of land cannot obstruct the windows and destroy the lights.² He cannot derogate from his own grant. It would be the same if the house and land were sold at the same time to different persons, each being aware of the conveyance to the other.³ A right of way, unless it arises as an easement of necessity, cannot arise by implication of law, because such

¹ Morgan v. Kirby, 1. L. R., 2 Mad., 46.

² See Corbett v. Jonas, [1892] 3 Ch., 137.

³ Allen v. Taylor, 16 Ch. D., 355; see Phillips v. Low, [1892] 1 Ch., 47; Robson v. Edwards, [1893] 2 Ch., 146.

right is not of a continuous character.¹ It follows that in order to create such right express words must be used in the conveyance. In a case where in a partition decree a direction was contained that the parties should take their respective shares by mutual conveyances, and the shares were allotted but no conveyances executed, it was held that the parties must be deemed to have taken under mutual conveyances and that therefore a grant of easements of light and air in accordance with the existing state of the premises must be implied.² In the Easements Act, section 13, it is expressly provided that a grant of an easement of necessity or of an apparent continuous easement shall be implied on the partition of property or on the transfer of it by operation of law; and this apparently was the law apart from that Act.³ In England it seems to be now settled that "easements, whether continuous or discontinuous, and even rights or modes of user which though not strictly easements are nearly akin to them, and which have been visibly enjoyed by the property sold over the property retained, will pass under the customary general words."⁴

'Rents and profits' are general words comprising every thing which the owner of the land may derive from it. Although *Rents and profits.* a man may be in personal occupation of property, he may none the less be charged with the 'rents and profits,' e.g., in cases where as vendor or mortgagee he may be liable to pay an occupation rent under sections 55 (4) (a) or 76 (b). As to apportionment of rent see sections 36 and 37.

The expression 'attached to the earth' is expanded under three heads in section 3. It means (a) rooted in the earth, *Things attached to the earth.* as in the case of trees and shrubs;⁵ (b) imbedded

* 1 *Morgan v. Kirby*, I. L. R., 2 Mad., 46; see too *Chunder Coomar v. Koylash*, I. L. R., 7 Cal., 670. But see *Barkshire v. Grubb*, 18 Ch. D., 616, and *Bayley v. G. W. R. Co.*, 26 Ch. D., 434. As to the effect of general words see *Municipality of Poona v. Vaman Rajaram*, I. L. R., 19 Bom., 797.

2 *Bolye Chunder v. Lalmoni*, I. L. R., 14 Cal., 797.

3 *Purshotam v. Durgoji*, I. L. R., 14 Bom., 452.

4 *Dart's Vendors and Purchasers*, 6th ed., p. 611; *Barkshire v. Grubb*, 18 Ch. D., 616; *Bayley v. G. W. R. Co.*, 26 Ch. D., 434; *Roe v. Siddons*, 22 Q. B. D., 224; *Chunder Coomar v. Koylash*, I. L. R., 7 Cal., 670; see *Wutzler v. Sharpe*, I. L. R., 15 All., 270; and section 6 of the Conveyancing Act quoted there.

5 *Ruttonji Edulji Shet v. Collector of Tanna*, 11 Moo. I. A., 295; *Kasim Mian v. Banda Hūsain*, I. L. R., 5 All., 616; *Faqueer Soonar v. Musumat Khudernn*, 2 N. W. P., 251; see *Nafar Chandra v. Ram Lal*, I. L. R., 22 Cal., 745; where it was held that by the general law it is not competent to a ryot to cut down or appropriate mango trees.

in the earth, as in the case of walls or buildings¹—mere juxtaposition, or the laying of an object however heavy on the land, does not amount to annexation: *e.g.*, a granary erected on straddles is not for the present purpose attached to the land:² (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. In the last clause an attempt seems to have been made to express the rule of English law as to fixtures in general, and the exceptions from it which have been admitted on the ground of public policy in favour of ornamental and trade fixtures.* The former, which would include pier-glasses, hangings and wainscot fixed with screws, may be considered to be excluded on the ground that they are not permanently attached to the wall or building; and the latter, even if they are intended to be permanently attached, do not fulfil the requirements of the second part of the clause, since their attachment is intended to increase their own utility merely. Thus Parke, B.,⁴ in holding that spinning mules attached by means of screws and molten lead to the floor were not therefore irremovably annexed to it, said:—"They were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of their annexation was not to improve the inheritance, but merely to render the machines steadier and more convenient to use as chattels."

The English law relating to this subject has been thus summarised by Lord Blackburn⁵—

"Whenever the chattels have been annexed to the land for the purpose of the better enjoying the land itself, the intention must clearly be presumed to be to annex the property to the land; but the nature of the annexation may be such as to show that the intention was to annex them only temporarily; and there are cases deciding that some chattels so annexed to the land as to be, whilst not severed from it, part of the land are removeable by the executor as between him and the heir. Lord Ellenborough in *Elwes v. Mawe* (3) says that those cases may be considered as decided mainly on the ground that where the fixed instrument, engine or utensil (and the building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be itself considered as personality. Even in such a case the degree and nature of the annexation is an important element for consideration, for where a chattel is so annexed that it cannot be removed, without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the

¹ See *Parbutty Bewah v. Woomatara Dabee*, 14 Beng. L. R., 201, as to the rule *quicquid plantatur solo, solo cedit* see note to section 108.

² *Wiltshire v. Cottrell*, 1 E. & B., 674.

³ *Elwes v. Mawe*, 2 Smith's L. C., 9th ed., p. 182, and notes thereto; *Lawton v. Lawton*, 3 Atk., 13.

⁴ *Hellawell v. Eastwood*, 6 Exch., 295.

⁵ *Wake v. Hall*, 8 App. Cas., p. 204.

"land; and as Lord Hardwicke said in *Lawton v. Lawton*, 'You shall not destroy the "principal thing by taking away the accessory to it,' and therefore as I think even "if the property in the chattel was not intended to be annexed to the property in "the land the amount of damage to the land by removing it may be so great as to "prevent the removal."

The result seems to be that for the purpose of this clause things are not attached which, firstly, can be removed without injury to themselves or the wall, building, &c., to which they are fastened, and which, secondly, were so fastened with the object of making them more useful and not with that of permanently improving the wall, &c., to which they are attached. The Conveyancing Act, 1881, also contains a provision which makes fixtures pass on the conveyance of land having houses or buildings thereon.¹ It has been held that fixtures so passing by a mortgage cannot be sold separately by the mortgagee as part of the mortgaged property.²

As to other incidents of an interest in land—rights and liabilities in respect of easements are referred to under the first paragraph of the present section, and the right to possession of documents of title is given to the transferee in the case of transfer by way of sale by section 55, sub-section 3.³ An intention that trees shall not pass to a buyer of the land is not necessarily implied from the fact that the trees have previously been mortgaged to a third party and the mortgage is not mentioned in the instrument of sale.⁴

Note 3. This and the next clause illustrate the principles considered in the last note. Where the property transferred is machinery attached to the earth, the moveable parts of the machinery might have been held, independently of this clause, to pass with the rest, as being attached to it for its "permanent beneficial enjoyment." It has been held that oil and flour mills, together with the steam engine and other machinery used in working them, are not "goods and chattels" within the meaning of the Small Cause Court Act of 1850, although as between landlord and tenant they might be removeable by the latter.⁵

Note 4. It has been held that doors and windows of a *pucca* building cannot be attached separately in execution of a decree, being part of immoveable property.⁶

¹ Section 6.

² *Batchelder v. Yates*, 28 Ch. D., 112, distinguished in *Climpson v. Coles*, 23 Q. B. D., 465; see below note to section 69; *Southport Co. v. Thompson*, 37 Ch. D., 64.

³ See note thereto, and *Shri Bhavani Devi v. Devrao*, I. L. R., 11 Bom., 485.

⁴ *Pandurang v. Bhimrav*, I. L. R., 22 Bom., 610.

⁵ *Miller v. Brindabun*, I. L. R., 4 Cal., 946, following *Parbutty Bewah v. Woomatara Dabee*, 14 Beng. L. R., 201.⁴

⁶ *Peru Bepari v. Ronuo*, I. L. R., 11 Cal., 164; *Queen-Empress v. Shaik Ibrahim*, I. L. R., 13 Mad., 518; *Purushottam v. Municipal Council of Bellary*, I. L. R., 14 Mad., 467.

Note 5. The accessories follow the principal and therefore the securities for a debt, and the interest accruing due on it pass on the assignment of the debt itself. In this clause, as in section 36, the rule laid down is that interest and other similar income falls to the assignee from the date of the assignment. To arrears previously accrued or accruing due, he is not in the absence of a special contract entitled. With regard to securities the rule may be exemplified by the case for which special provision is made in the Contract Act, section 140. The surety on satisfying the original creditor becomes himself the creditor, and is invested with all the rights which the creditor had against the principal debtor. If a debt secured by mortgage is assigned, the assignee is entitled to the benefit of the mortgage. The two cannot be divided so that the mortgage should pass to one person and the debt remain in another.¹ Where however a promissory note was given by way of security for a debt for which a mortgage also was taken by the payee, it was held that a *bona fide* indorsee of the note for value was entitled to recover on it notwithstanding that the payee had assigned the mortgage to a third person and received from him the amount of the debt.² A distinction has been

Distinction between assignment of debt and money-decree.

made between that case and the case where a money-decree obtained in respect of a secured debt is sold. In a case where the purchaser of a money-decree sued to enforce his alleged lien by sale, it was held that the securities not being mentioned in the sale-deed for the debt had not passed to him, and that therefore he could not maintain the suit.³

Note 6. Interest as between the transferor and transferee is deemed to accrue day by day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.⁴

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Commentary.

In the case of a sale of immoveable property of the value of Rs. 100 or upwards, and in the case of a sale of a reversion or other intangible

¹ Walker v. Jones, L. R., 1 P. C., 50; Jones v. Gibbons, 9 Ves., 410; see Subramaniam v. Perumal, I. L. R., 18 Mad., 451.

² Glasscock v. Balls, 24 Q. B. D., 13

³ Ganpat v. Sarupi, I. L. R., 1 All., 446.

⁴ Section 36.

thing, there must be a writing, which further must be registered.¹ In all cases of simple mortgage there must be a writing, registered or not, according to the value of the amount secured: in all mortgages where the amount secured is Rs. 100 or upwards, there must be a writing and it must be registered.² Leases from year to year, or for any time exceeding one year or reserving a yearly rent, must be in writing, and registration is also necessary.³ Exchanges are under the same rules as sales.⁴ In all cases of gift of immoveable property there must be a writing and registration.⁵ In the case of the assignment of an actionable claim, notice in writing should be given to the debtor in order to make the transaction valid as against him.⁶ By the Trusts Act⁷ no trust in relation to immoveable property is valid, unless declared by will or by other instrument which must be signed and registered: and unless the ownership of the property is transferred to the trustee, writing and registration is equally required for a trust of moveable property.

10. Where the property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition restraining alienation.

Commentary.

In this and the seven following sections an endeavour has been made to express the results of the decisions founded on the principle of public policy which condemns any attempt to shackle the free disposition of property or prevent its circulation. A man is not permitted to impose fetters on his own liberty; no more is it permissible to deprive property of the alienability which is its most important incident.

1 Section 54.

2 Section 59.

3 Section 107.

4 Section 118.

5 Section 122.

6 Section 132.

7 Act II of 1882, section 5.

The question to what extent this principle should be carried out, and what is the exact line to be drawn between conditions in restraint of alienation which are valid and those which are not valid, has been the subject of numerous cases. Conditions *absolutely* restraining the transferee from disposing of property are here declared void.¹ If the restraint is not absolute, it follows that as far as this section is concerned the condition may be valid. The rule has been put in much the same terms by Jessel, M. R., who in *In re Macleay*² says, "the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance and not of mere form." And he proceeds to add:—"You may restrict alienation in many ways. You may restrict it by prohibiting a particular class of alienation, or you may restrict it by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time." He held accordingly that a condition prohibiting the alienation from selling the property out of the family, which further being limited to the life of the first tenant-in-tail was not void for remoteness, was a good condition. But the test above stated has not been adopted in all cases; for in some authorities the larger principle is laid down that a condition annexed to a gift prohibiting alienation is void for repugnancy. Relying on this principle Pearson, J., held that a condition requiring the property devised to be sold, if offered for sale at all, to the testator's wife at a price not exceeding a third of its value, was void; though it was to operate only during the widow's life. The condition was held to be equivalent to a prohibition of alienation during the widow's life.³ On the other hand a condition requiring the

1 The law has been so declared alike for Hindus and Muhammadans, see *Nabob Amiruddoula v. Nateri Srinivasa Charlu*, 6 Mad. H. C., 356; *Kristna Mudali v. Shanmuga*, *ib.*, p. 255; *Sonatun Bysack v. Dossee*, 8 M. I. A., p. 76; *Rajah Chundernath Roy v. Kooar Gobindnath Roy*, 11 Beng. L. R., 112; *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*, 9 Beng. L. R., 377; *Bhairo v. Parmeshri*, 1 L. R., 7 All., 516; *Anantha v. Nagamuthu*, 1 L. R., 4 Mad., 200; *Mahram Das v. Ajudhia*, 1 L. R., 8 All., 453.

2 L. R., 20 Eq., 190. In this case the M. R. while considering that a condition to alien to none but A might be void, differed from the decision of Romilly, M. R., in *Attwater v. Attwater*, 18 Beav., 330, where the following condition was held void, *viz.*, "not to sell out of the family, but if sold at all it must be to one of A's brothers hereafter named."

3 *In re Rosher*, 26 Ch. D., 801, where the cases are collected. In this case Pearson, J., comments upon *Large's case*, 3 Leon, 182, quoted as an authority for the proposition that a restraint on alienation limited to a stated period is good, if it does not contravene the rule against perpetuities: see *re Dugdale*, 38 Ch. D., 176.

transferee to offer the property to the transferor for sale at the market price, in other words reserving a right of pre-emption, is not void for repugnancy or as being absolutely prohibitory of alienation. In a recent case the plaintiffs, a Railway Company, conveyed land to G. P., stipulating that he or his heirs should at any time when required, and on receipt of a certain sum, re-convey the land to the Company.¹ The defendant bought the land from G. P. with notice of the covenant, and, when called upon to re-convey the land under it, refused to do so. In the suit which was thereupon brought by the Company, it was held that the covenant was invalid, as it purported to give an interest to arise on an event which might occur after the period allowed by the rules as to remoteness. It was observed that there was no distinction between a case of a limitation to A in fee, with a proviso that, whenever a notice in writing is sent and £100 paid by B or his heirs to A or his heirs, the estate shall vest in B or his heirs, and a contract that, whenever such notice is given and such payment made by B or his heirs to A or his heirs, A shall convey to B or his heirs. In either case there was the same fetter on the estate and on the owners of it for all time, and to either case therefore the rules as to remoteness would apply.² A covenant restricting the use of land stands on a different footing and is not obnoxious to the rule against perpetuity, although for other reasons it may be void under section 11.³

A natural incident of joint property is the right of partition, and any condition purporting to deprive a joint tenant of this right is void.⁴ On a partition effected by three joint tenants it was agreed between them that on any one dying soulless his share should go to the others and that no one should alienate his share. It was held that though this agreement might be binding between the parties it could not bind their descendants,⁵ nor could it bind persons purchasing from a party so restrained.⁶ In Bombay it has been held that even the parties thereto would not be bound by such an agreement.⁷

1 *London and S. W. R. Co. v. Gomm*, 20 Ch. D., 562.

2 See also *Chandi v. Sideswari*, I. L. R., 16 Cal., 71, and section 23, Contract Act.

3 *Mackenzie v. Childers*, 43 Ch. D., 265; see too as to Gomm's case, *Ray v. Walker*, [1892] 2 Q. B., 88. As to restrictions on use of land, see note to section 40.

4 *Mokoondo v. Gonesh*, I. L. R., 1 Cal., 104.

Venkatramanna v. Brammanna, 4 Mad. H. C., 345.

6 *Anand Chandra v. Frankisto*, 3 B. L. R., O. C., 14; *Rajender v. Sham Chund*, I. L. R., 6 Cal., 106.

7 *Ramalinga v. Virupakshi*, I. L. R., 7 Bom., 538.

A covenant not to alienate is frequently made part of a mortgage transaction. It is clear that such a covenant made by a debtor in favour of his creditor does not of itself effect a mortgage of the property described.¹

Condition restraining alienation by a mortgagor. How far it is effective in a case where the mortgage is otherwise established, seems doubtful. In a Calcutta case, one of the terms of the mortgage was that the mortgagor would not sell absolutely or conditionally grant in zurpeshgi lease, &c., the said properties to any one.² He subsequently leased part of the property in zurpeshgi to the defendant, against whom a suit to set aside a lease and recover possession was brought by the purchaser of the property, under a decree made for the sale of the mortgaged property. It was held that the covenant in the mortgage created only a personal liability between the mortgagor and the mortgagee, and that the suit was wrongly conceived, the purchaser's proper course being to sue "the zurpeshgidar to have his right declared to sell the property to satisfy his mortgage debt so as to give the zurpeshgidar an opportunity of redeeming."

In Allahabad where a mortgagee, having obtained a decree for sale of the property, sued to cancel a lease made by the mortgagor, in violation of a covenant in the mortgage not to transfer the mortgaged property to any one, it was held that the lease, though not void, was voidable at the option of the purchaser who had bought under the mortgage-decree;³ and other cases have been decided on the same principle.⁴ But it is otherwise if the mortgagor deals with his equity of redemption for the *bonâ fide* purpose of paying off the mortgage debt. A stipulation not to alienate mortgaged property would not operate to avoid a conveyance so made for that purpose.⁵ In a Madras case it was suggested that these decisions might be reconciled "if it be held that the condition binds a purchaser for value only when he has notice of it, and that in the one case the purchaser had, and in the other he had not, such notice."⁶

More recently Mahmood, J., having before him a case where it had been held by the lower Court that the plaintiff was, on the strength of

1 See note to section 58.

2 Radhapershad v. Monohur, I. L. R., 6 Cal., 317.

3 Chunni v. Thakur Das, I. L. R., 1 All., 126; and see Ali Hasan v. Dhirja, I. L. R., 4 All., 518.

4 Mulchand v. Balgobind, I. L. R., 1 All., 610; Lachmi v. Koteswar, I. L. R. 2 All., 826.

5 Ram Saran v. Amirta, I. L. R., 3 All., 369; and see foot-note in I. L. R., 1 All., 128; see on the question of fettering equity of redemption note to section 60.

6 Venkata v. Kannam, I. L. R., 5 Mad., 184

such a covenant contained in his mortgage bond of 1875, entitled to have a subsequent hypothecation and sale declared invalid to the extent of the interest transferred thereby, expressed the opinion that the lower Court had misunderstood the cases.¹ In his view the authorities only showed that an alienation in contravention of a covenant was voidable so far as it might defeat the mortgagee's rights. If he could show that the alienation by the mortgagor might infringe his rights, he might sue to set it aside, and thus the mortgagee would gain from the covenant no further protection than the law would otherwise give him.

There are two exceptions from the general rule for which provision is made in this section. It is permissible under this section and section 108 for a lessor to fetter the liberty of alienation which his lessee would ordinarily have. A lessor even where the lease is a permanent one may by apt words prohibit alienation, or attempts to alienate, by his lessee and stipulate that a breach of the condition shall work a forfeiture of the lessee's interest.² In section 12 also conditions against alienation when occurring in leases are excepted (see note to section 111).

A second exception is made in the case of married women, not being Hindus, Muhammadans or Buddhists. It will be observed that the clause, unlike the second part of section 12, does not expressly refer to attempts to transfer. Such an attempt is merely inoperative and will not occasion any forfeiture.³ The common clause in restraint of anticipation was introduced into marriage settlements and wills to complete the protection which the doctrine of 'separate use' had already extended to married women. According to the common law, abrogated by the Succession Act as to all marriages taking place after the 1st January 1866,⁴ it may be broadly stated that the property of the woman became on her marriage the property of her husband. By means of 'the separate use' and the intervention of trustees, property might be so settled that she could hold it and deal with it as freely as if she were unmarried, and the clause in restraint of anticipation was designed to protect her against herself by putting it out of her power to sell or encumber the corpus. The clause may by express words be restricted to a particular marriage. Unless so

1 *Ali Hasan v. Dhirja*, I. L. R., 4 All., 518.

2 *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 260; see note 10 to section 108, compare section 12 and see sections 111 and 112.

3 *In re Wormald*, 43 Ch. D., 630.

4 Act X of 1865, sections 4 and 44, applicable to all persons not professing the Hindu, Muhammadan, Buddhist, Sikh or Jain religion, see *Miller v. Administrator-General of Bengal*, I. L. R., 1 Cal., 412; *Sarkies v. Prosonomoyee*, I. L. R., 6 Cal., 794,

restricted it will operate during any marriage,¹ if not previously destroyed, but it is only during coverture that it can operate.² The effect of this proviso relating to married women, which is also found in sections 56 and 58 of the Trusts Act, is merely to except from the general rule laid down in the section the particular case of a married woman, and not to give to a restraint upon alienation any greater force than it had before the passing of the Act. It only preserves to such restraint the effect it had previously, leaving the Married Women's Property Act of 1874 and the decisions upon it untouched. By section 8 of that Act, which applies equally to those having an English or an Indian domicile,³ it is in effect provided that if a married woman has separate property and if any person enters into a contract with her on the faith of the obligation being satisfied out of that property, then such person shall be entitled to sue and, to the extent of her separate property, to recover what he might have recovered in such suit had she been unmarried at the date of the contract and thenceforward until the date of the execution of the decree. It was held by the High Court of Bengal that the creditor in respect of a debt incurred during marriage could by virtue of that section enforce his claim against his debtor's separate property, settled upon her without power of anticipation.⁴ Farran, J., followed this decision, but with doubt, thinking that the power to contract as an unmarried woman did not necessarily involve the power to dispose of property as to which her powers of disposition were restrained by the will of the settlor, and also thinking that section 8 of the Married Women's Property Act so construed was hardly reconcilable with section 10 of the present Act.⁵ It may be noted that all rules of Hindu, Muhammadan and Buddhist law are already exempted from the operation of this chapter by section 2 (d).

Whether involuntary alienation is included must depend on the terms of the condition or covenant. If there is merely a condition against alienation,⁶ it is understood to refer to alienations by act of parties and

Involuntary alienation.

1 Hawkes v. Hubback, L. R., 11 Eq., 5; Tullett v. Armstrong, 4 M. & C., 377.

2 Pike v. Fitzgibbon, 17 Ch. D., 454; Smith v. Lucas, 18 Ch. D., 531; Stanley v. Stanley, 7 Ch. D., 589; Sanger v. Sanger, L. R., 11 Eq., 470, approved in Axford v. Reid, 22 Q. B. D., 548; Peters v. Manuk, 13 Beng. L. R., 383.

3 Allumuddy v. Braham, I. L. R., 4 Cal., 140.

4 Hippolite v. Stuart, I. L. R., 12 Cal., 522. See proviso to section 68, Trusts Act II of 1882.

5 Cursetji v. Rustomji, I. L. R., 11 Bom., 348.

6 Nil Madhab Sikdar v. Narattam, I. L. R., 17 Cal., 826; Golak Nath Roy v. Mathura Nath, I. L. R., 20 Cal., 273. See note 2 to section 12.

therefore an assignment by operation of law taking effect *in invitum* as by a sale in execution or, in the case of property vested in a company, by sale effected by the official liquidator, does not constitute a breach of the condition.¹ But if express words referring to involuntary alienation are introduced, effect is given to them.² Where the clause was as follows: —‘You are not to let it be sold or attached or sold in satisfaction of judgment-debts; if you do let it, I shall take away the land and give it to others for cultivation,’ and the plaintiff, a judgment-creditor, sued the defendant under whom he held to have his right to attach and sell the land declared, the suit was dismissed.³

According to the English cases a third exception from the general rule is introduced, in favour of charities, so far as they are protected by the statute law. Since the practical effect of making a gift for a charitable purpose is ordinarily to put an absolute restraint on the alienation of property for an indefinite time,⁴ it seems strange that the present section was not included among those named in section 17.

- [1] **11.** Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.
- [2] Nothing in this section shall be deemed to effect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Commentary.

Note 1. A condition in absolute restraint of alienation is declared by the last section to be void; similarly by the present section a condition intended to restrict the

Restriction on enjoyment of property.

1 *In re West Hopctown Tea Company, Limited*, I. L. R., 12 All., 192.
 2 *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 256, in which Sargent, C.J., discusses these sections as to alienation; *Tāmaya v. Timapa*, *ib.*, p. 262; *Subbaraya v. Krishna*, I. L. R., 6 Mad., 159; and see *Diwali v. Apaji*, I. L. R., 10 Bom., 342, and *Woodfall's Landlord and Tenant*, 12th ed., p. 630, and note 2 to section 12.
 3 *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 256; *Roe v. Galliers*, 8 T. R., 133; and see section 12 and note.
 4 *Shri Ganesh Dharnidhar v. Keshavray*, I. L. R., 15 Bom., 625 at p. 637.

transferee in his enjoyment of the property will in general fail, when the interest created in his favour is absolute. Thus for instance a condition that the property should be let for ever at a fixed rent is void; though a direction that the rents of existing tenants should not be raised is valid, because this is a reservation in favour of the tenant, and the interest created by the transfer is not absolute.¹ On the above principle it has been held that an agreement made on a division of family property, limiting the right of the parties to dispose of it if they should die without issue, is void as taking away a legal incident of the property.² It has also been held that an attempt in a will to postpone partition,³ and in another case that a condition to the effect that 'none of the houses be disposed of by division or otherwise without the consent of all' the transferees,⁴ must for the same reason be inoperative.

Of course restrictive covenants in leases are not affected by the present section, as the interest of the lessee in the property is not absolute.

Note 2. "It is not competent to a vendor to create rights unconnected with the enjoyment of land and to annex them to it."⁵ But for the improvement or the better enjoyment of one piece of land, restrictions may be imposed on the power to deal with an adjoining piece of land; and the restrictive condition need not be expressed to be for the 'beneficial enjoyment of immoveable property.' In *McLean v. McKay* (6) the conveyance contained an agreement that certain land 'should never be hereafter sold, but should be left for the common benefit of both parties and their successors.' The Privy Council, while holding the restriction on sale to be invalid, construed the other clause as separable and as an agreement on the part of the grantor to leave the land in the state in which it was at the time of the conveyance for the advantage of the parties as adjoining owners.⁶ Even such a restriction may cease to be enforceable if the character of the property sold so changes as to make the restriction absurd.⁷

1 *Tibbitts v. Tibbitts*, 19 Ves., 656.

2 *Venkatramanna v. Brammauna*, 4 Mad. H. C., 345; *Rajender v. Sham Chund*, I. L. R., 6 Cal., 106; *Ramlinga v. Virupakshi*, I. L. R., 7 Bom., 538, and see *ante* p. 48.

3 *Mokoondo v. Gonesh*, I. L. R., 1 Cal., 104.

4 *Shaw v. Ford*, 7 Ch. D., 669.

5 *Ackroyd v. Smith*, 10 C. B., 164.

6 *McLean v. McKay*, L. R., 5 P. C., 327. The leading case on this subject is *Tulk v. Moxhay*, 2 Phill., 774, which is stated in the note to section 40. See also *Haywood v. Brunswick, & Co., Society*, 8 Q. B. D., 403, and *London & S. W. R. Co. v. Gomm*, 20 Ch. D., 562, and the other cases cited under the above section.

7 *Bedford v. Trustees of the British Museum*, 2 M. & K., 552; *Doherty v. Allman*, 2 App. Cas., 709; and see cases cited in note to section 40.

As to the effect of such restrictions on subsequent transferees, see section 40.

- [1] **12.** Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

- [2] Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Commentary.

In making a gift or other grant it is competent to the grantor to annex a condition on the happening of which the grant shall be defeated, such condition being called a condition subsequent (see sections 31 and 32). The present section creates an exception from this rule by declaring that the condition must not be either the insolvency of the grantee or an attempt on his part to dispose of the property.

Note 1. A condition or limitation framed with the object of defeating the transferee's creditors on his becoming insolvent, or the persons to whom he may attempt to transfer the property, is void.¹ Notwithstanding such condition, the property would pass to the assignee in insolvency or the transferee, as the case might be. Under the Indian Succession Act it is otherwise. As illustration (g) to section 107 of that Act the following case is given:—

“An estate is bequeathed to A until he shall take advantage of the Act for the “Relief of Insolvent Debtors, and after that event to B. B's interest in the bequest “is contingent until A takes advantage of the Act.”

In England, though property cannot be given without the power of alienation incidental to it and cannot be settled on a man in such a manner that his interest should continue after his bankruptcy, property not originally belonging to the beneficiary² may be so settled as to give him a life-interest, terminable on insolvency or other involuntary alienation or on his attempting to alienate it.³ And it has been also held that a man may so settle his property as to give the trustees a

¹ See sections 28 and 31.

² *In re Pearson*, 3 Ch. D., 807; *Detmold v. Detmold*, 40 Ch. D., 585.

³ *Brandoh v. Robinson*, 18 Ves., 429; *Rochford v. Hackman*, 9 Hare, 475; *Hatton v. May*, 3 Ch. D., 148; *In re Machu*, 21 Ch. D., 838; *In re Bedson's Trusts*, 28 Ch. D., 523; *Metcalf v. Metcalfe*, [1891] 3 Ch., 1; see *Hormusji v. Dadabhoy*, I. L. R., 20 Bom., 310, decided with reference to English cases as this Act was not applicable.

discretion to divide it between himself and his wife and children with absolute power of selection and to exercise this power even after his bankruptcy.¹ Insolvency means the condition of a man who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.²

Note 2. Under this Act it is only when occurring in a lease that such a limitation can be operative. In that case *Proviso for case of lease.* Only the question can arise, what is meant by 'endeavouring to transfer or dispose' of property. In English cases it has been decided on the construction of instruments containing similar provisions, that merely preliminary acts do not constitute an attempt or endeavour to alienate, for instance the making of inquiries, or obtaining a valuation in view to effecting a sale, is not an attempt.³ The condition must be for the benefit of the lessor, and therefore a clause in a lease, merely prohibiting alienation and declaring that on alienation the lease shall be void and not reserving any right of re-entry to the lessor, is void and cannot be made the ground of ejectment by the lessor or his assigns.⁴ A proviso for re-entry on the lessee's bankruptcy is held to refer to the bankruptcy of the person for the time being in possession of the term. There is no forfeiture therefore on the bankruptcy of the original lessee if he has previously made a valid assignment of his interest to another.⁵

Where there is a clause in a lease merely prohibiting alienation, it is construed as referring to voluntary alienation and not to alienation by operation of law. If therefore the lessee's interest under such a lease is attached and sold in execution of a decree, the lessor has no ground for impeaching the title of the purchaser. It is competent however for a lessor to stipulate for a forfeiture or for a right of re-entry on the tenant's interest being taken in execution; and in such a case the right of re-entry has been held to arise on attachment only, though there would not, strictly speaking, be a breach of the stipulation until the land was both attached and sold. "As the attachment," said Sargent, C.J., "by itself can be of no use to the creditor, the debtor being already by his lease prevented from alienating, and as it would be necessary even if the attachment were allowed, to forbid the sale by a concurrent order, the attachment, which under these circumstances "

1 Holmes v. Penny, 3 Kay & J., 90; 3 Davidson's Conveyancing, Pt. I, 134.

2 Contract Act, section 96, Expl.

3 Graham v. Lee, 22 Beav., 388; Jones v. Wyse, 2 Keen, 285.

4 Nil Mabbad Sikdar v. Narattam, L. L. R., 17 Cal., 826: see note 4 to section 111.

5 Smith v. Gronow, [1891] 2 Q. B., 394.

"would be futile, should not, we think, be permitted."¹ In the absence of such a stipulation and where there is only a covenant not to alienate, the lessor may restrain the alienation by injunction, but after its completion he would have no remedy except in damages.² A condition in restraint of alienation is not to be implied in a lease merely because the terms of demise are "you are to enjoy, you and your grandsons from generation to generation."³

As to involuntary alienation of the interest of the person subject to this restrictive covenant see note to section 10.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Commentary.

This section corresponds with section 100 of the Indian Succession Act which, notwithstanding that the power of disposition recognized by it goes beyond what Hindu law allows, is made applicable to Hindus. In the case supposed there must necessarily be a precedent estate; because there can be no grant in favour of unborn persons.⁴ The

1 *Vyankatraya v. Shivrambhat*, I. L. R., 7 Bom., 256.

2 *Tamaya v. Timapa*, I. L. R., 7 Bom., 262; *Subbaraya v. Krishna*, I. L. R., 6 Mad., 159; and see *ante* p. 52.

3 *Vinayak Moreshwar v. Baba Shabudin*, I. L. R., 13 Bom., 375.

* 4 It is pointed out by Mr. Stokes (Proceedings of the Council of the Governor-General, 1882, p. 89) that though there can be no transfer to an unborn person, there may be an interest created in his favour by means of trustees. But this cannot be under Hindu law, for, though trusts are permissible, a man cannot by the intervention of trustees create a beneficial interest, otherwise unauthorized by law. *Tagore v. Tagore*, 9 Beng. L. R., p. 402; *Kristomoni Dasi v. Narendro Krishna*, I. L. R., 16 Cal., 392; see *Trusts Act II of 1882*, section 4 (b) and (c); as to powers see *Javerbhai v. Kahlilbhai*, I. L. R., 15 Bom., 326; on appeal I. L. R., 16 Bom., 492; see also note 5 to section 2.

precedent estate may either be an estate limited in time, *e.g.*, an estate for life, or an estate defeasible upon some condition. The effect of the section is that this estate will not be determined in the way intended unless the remainder created in favour of the unborn persons comprises the whole of the grantor's interest. The ulterior disposition failing, the prior disposition is not affected.¹ It is sufficient that the whole remaining interest is vested in the person subsequently born and alive at the time when his interest accrues, and it is not required that the immediate enjoyment should be vested in him (section 20). According to English law, while there may be a limitation in favour of unborn children, a remainder to the children of such children is void, for there cannot be "a possibility upon a possibility." This rule is independent of the rule against perpetuity,² and similarly the present section is independent of the rule laid down in section 14, so that a transfer may be invalidated by it although it is not obnoxious to the rule against perpetuity.

The section has no application when successive interests limited by time or otherwise are granted to persons living at the date of the grant.³

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

Commentary.

This section corresponds with section 101 of the Indian Succession Act,⁴ which also applies to moveable as well as immoveable property.⁵ Under the last preceding section a person not born at the date of a transfer may take an interest created by it in his favour, provided that interest exhausts the remaining interest of the transferor. Under this section it is further permissible to postpone the vesting of his interest

¹ See section 30.

² *In re Frost*, 43 Ch. D., 246; *Whitby v. Mitchell*, 44 Ch. D., 85.

³ Compare New York Code, section 231, &c.

⁴ *Maseyk v. Fergusson*, I. L. R., 4 Cal., 304; compare *Administrator-General of Madras v. Money*, I. L. R., 15 Mad., p. 468; section 101 is made applicable to Hindus, but not to Muhammadans.

⁵ *Cowasji v. Rustonji*, I. L. R., 20 Bom., 511.

during his minority. Thus a gift to A for his life, with remainder to the eldest son of an intended marriage on his attaining his 18th year, is valid : whereas a gift in remainder to such son on his reaching his 19th year, or, on some third person attaining his majority, would be invalid. In deciding cases under this Act as under the Indian Succession Act, regard will be had to possible events, and therefore, if the interest may be postponed beyond the limit allowed, it cannot take effect, whatever is the actual event.¹ Although the section deals with transfers only covenants may likewise be void for remoteness, for if permitted such covenants would defeat the provisions of this section.²

While this section leaves to owners of property a greater liberty than is allowed by Hindu law, according to which there can be no transfer except to a person living at the time,³ it has in some respects the effect of restricting the power which is allowed by English law. According to English law a disposition of any kind of property intended to take effect in the future must be so framed as necessarily to take effect, if at all, after a lapse of time not exceeding twenty-one years from the death of some living person, or of the survivor of certain persons living at the date of the settlement. And these twenty-one years need not have reference to the infancy of any person. Thus a gift may be made to take effect simply on the expiration of twenty-one years. A gift to the person, who within twenty-one years should climb up the cross of St. Paul's, would be good. The section seems to be so worded that, while it can hardly be construed as applicable to the case of a gift made to take effect on the expiration of a certain time, it certainly would prohibit an owner of property from tying it up during the life-time of a living person and in addition, an *absolute* period of eighteen years.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class.

Transfer to class
some of whom come
under sections 13
and 14.

¹ See Indian Succession Act, section 101, illustration (a); *Brajanath Dey v. Anandamayī*, 8 Beng. L. R., 208.

² *Chandi Churn v. Sidheswari*, I. L. R., 16 Cal., 71; *L. & S. W. R. Co. v. Gomm*, 20 Ch. D., 562; see section 23, Contract Act, and *ante* p. 48.

³ *Mayne's Hindu Law*, § 353; *ante* p. 9.

Commentary.

This section corresponds with section 102 of the Indian Succession Act. The rule which it embodies is a rider upon the law of remoteness as expressed in the two preceding sections. If in the case of a gift to a class of persons, the ascertaining of the class and the vesting of the property may be postponed beyond the period allowed by law, the gift is void as regards the whole class. The whole gift fails. So stated, the rule is that laid down in *Leake v. Robinson*¹ which is thus explained:—"I must make a new will for the testator if I split into "portions his general bequest to a class and say that because the "rule of law forbids his intention from operating in favour of the whole "class, I will make his bequests what he never intended them to be, "viz., a series of particular legacies to particular individuals or (what "he had as little in contemplation) distinct bequests in each instance to "two different classes, namely, to grandchildren living at his death and "to grandchildren born after his death." What is meant by a gift to a class as understood in the passage just cited is explained in the following terms, recently quoted with approval by Sargent, C. J. from *Jarman on Wills*²:—

"A number of persons are popularly said to 'form a class' when they can be 'designated by some general name, as 'children', 'grandchildren', 'nephews'; but in "legal language the question whether a gift is one to a class depends not on these "general considerations, but upon the mode of gift itself, namely, that it is a gift of "an aggregate sum to a body of persons uncertain in number at the time of the gift, "to be ascertained at a future time, and who are all to take in equal or some other "definite proportions, the share of each being dependent for its amount on the "ultimate number of persons."

Where the gift is not affected by the vice of remoteness and the question is merely as to the persons capable of taking at the time when they have to be ascertained, the section has no application though the reasoning used in *Leake v. Robinson*¹ might be applicable. Those who have died, or for any other reason are incapable of taking, are simply excluded, the rest taking the whole. Thus a gift to A for life with remainder to A's sons would take effect on his death in favour of his sons then living. It would not be vitiated by the circumstance that sons might be born after his death, who for that reason would be

¹ 2 Merivale, 368; *Pearks v. Mosley*, 5 App. Cas., 714.

² 4th ed., p. 268, quoted in *Krishnanath v. Atmaram*, 1 L. R., 15 Bom., 548; see also to the ascertainment of the class beyond the period allowed by the rule against remoteness, *Mervin v. Crossman*, [1891] 4 Ch., p. 205; *Smith v. Bengy*, *ib.*, p. 248.

incapable of taking.¹ In the second illustration to section 102 of the Succession Act the bequest being to B, C and D, and all other children of A who shall attain 25, it is said that the mention of B, C and D by name does not prevent the bequest from being regarded as a bequest to a class.² Of this illustration it is observed by the Judicial Committee that it imports into India an English rule of construction which usually defeats the intention of the testator and that it seems out of place as attached to a section intended not to define the word 'class,' but only to establish a special incident of gifts to classes.³

16. Where an interest fails by reason of 'any of the rules contained in sections thirteen, fourteen and fifteen, any interest^a created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

^aTransfer to take effect on failure of prior transfer.

Commentary.

This section corresponds with section 103 of the Indian Succession Act, which is illustrated by two examples.⁴ If the succeeding interest is to arise upon either of two contingencies happening, one being within and the other not within the prescribed limits, and the former contingency in fact happens, the succeeding interest will take effect without reference to the other contingency: *e.g.*, if A grants a house to B, in case C dies without leaving sons, or in case such sons should die without issue; on C's death without leaving a son, B will take, although the second contingency offends against the rule in section 14.⁵

1 *Rai Bishen Chand v. Mussumat Asmaida*, I. L. R., 6 All., 560; s.c., I. R., 11 I. A., 164; *Ramlal Sett v. Kannai Lal*, I. L. R., 12 Cal., 663; *Krishnanath v. Atmaran*, I. L. R., 15 Bom., 543, where *Lenko v. Robinson* and the Indian cases are reviewed, *Soudanincey v. Jogesh Chunder*, I. L. R., 2 Cal., 262, and *Kherodemoney v. Doorgamoney*, I. L. R., 4 Cal., 455, being questioned; see also *Jairam v. Kuverbai*, I. L. R., 9 Bom., 491; and *Manjamma v. Padmanabhayya*, I. L. R., 12 Mad., 393; *Mangaldas v. Tribhuvandas*, I. L. R., 15 Bom., 653, *Krishnarao v. Benabai*, I. L. R., 20 Bom., 571, and *Mayne's Hindu Law*, § 354, &c.

2 In *Administrator-General of Madras v. Money*, I. L. R., 15 Mad., p. 466, a bequest "to my grandchildren by my late daughter, also to my grandson F. W. M. and to his step-brother G. W. M." was held to be a bequest not to a class but to *personæ designatæ*.

3 *Rai Bishen Chand v. Mussumat Asmaida*, I. L. R., 6 All., 560; s.c., I. R., 11 I. A., 164, and see *Maseyk v. Fergusson*, I. L. R., 4 Cal., 304.

4 See also *Brajanath Dey v. Anandamayee*, 8 Beng. L. R., 208; as to English law, *Monypenny v. Dering*, 2 D. M. & G., 145; *In re Abbott*, [1893] 1 Ch., 54.

⁵ *Watson v. Young*, 38 Ch. D., 436.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

Commentary.

As is observed at the end of the note to section 10, an exception from the general rule against perpetuities is allowed in favour of gifts for charitable uses.

Section 1 of the Indian Trusts Act—Act II of 1882—similarly exempts trusts relating to charities from the general law, while section 105 of the Indian Succession Act makes special provision for bequests to religious or charitable uses, and examples are given in the illustrations. Such purposes as those mentioned in the present section would be designated as charitable; for, in the technical sense which the term ‘charity’ has acquired, any object beneficial to the community or to some section of it is a charitable object.¹ “Charity in its legal sense,” said Lord Macnaghten, “comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly, or indirectly.”²

The case in which these observations were made was recently followed by the High Court of Bombay.³ The question then for determination was whether or not a university, which was not an educational institution but only conferred degrees, could claim exemption from a Municipal tax on buildings on the ground that the University library, &c., “were exclusively occupied for charitable purposes;” and the Court answered this question in the affirmative. A gift for the purpose

1 Goodman v. Mayor of Saltash, 7 App. Cas., p. 650, followed *In re Norwich Town Close Estate Co.*, 40 Ch. D., 306; for illustration, see *University of London v. Yarrow*, 26 L. J., Ch., 430; *Obert v. Barrow*, 55 Ch. D., 472; *Hall v. Urban Authority of Derby*, 16 Q. B. D., 163.

2 Commissioners of Income Tax v. Pemsel, [1891] App. Cas., pp. 581, 583.

3 *University of Bombay v. Municipal Commissioners for the City of Bombay*, I. L. R., 16 Bom., 217.

of perpetually keeping a choultry in repair is a charitable gift.¹ And a gift of money for building a well and an *avada* (a cistern of water for animals to drink out of) comes under the same category.² For the purpose of section 539 of the Civil Procedure Code where the expression "trusts created for public charitable or religious purposes" is used, a fund instituted for the support of a Jain temple and a fund for the payment of wages to priests or the making of gifts to poor persons were held to constitute public charities.³ On the other hand, in the case of *Thomson v. Shakespear* a gift of money to be laid out upon a building that was to stand in perpetual memory of Shakespear was held not to be a charitable gift.⁴ With regard to gifts for religious purposes, the Court of Appeal has recently laid down that they should be treated *prima facie* as gifts for charitable purposes.⁵ If it can be shown that they possess no public element and include no purpose of public utility, as was held to be established in the case of a bequest for the benefit of a Dominican convent,⁶ the gifts will not be regarded as charitable. "So a gift for the performance of ceremonies for the spiritual benefit of the donor and his family is not charitable. 'The observance can lead to no public advantage.'⁷ A gift for the repair of a private tomb or monument,⁸ or to found a private museum,⁹ would not be saved by the section. Nor again would a gift for the performance of masses for the dead be protected by the section, although neither the English law as to superstitious uses nor the statute of mortmain is in force in India.¹⁰

Inasmuch as the whole chapter is inapplicable to endowments, governed by Hindu, Muhammadan or Buddhist law, a gift in perpetuity for a private object may still be good.¹¹ But under cover of a gift for a religious purpose it is not competent to a donor, Hindu or Muhammadan,

1 Gulam Hussain v. Aji Ajam Tadallah, 4 Mad. H. C., 44.

2 Jannabai v. Khimji, I. L. R., 14 Bom., 1.

3 Thakersey v. Harbham, I. L. R., 8 Bom., 432.

4 29 L. J., Ch., 140, 276.

5 White v. White, [1893] 2 Ch., 41.

6 Cocks v. Mannors, L. R., 12 Eq., 574.

7 Yeap Cheah v. Ong Cheng, L. R., 6 P. C., 381; Limji v. Bapuji, I. L. R., 11 Bom., 441; Fatmabibi v. Advocate-General, I. L. R., 6 Bom., 42.

8 Rickard v. Robson, 31 Beav., 244; s.c., 31 L. J., Ch., 397.

9 Fowler v. Fowler, 33 Beav., 616.

10 Broughton v. Mercer, 14 Beng. L. R., 442; Mayor of Lyons v. E. I. Co., 1 Moo. I. A., 175; Advocate-General v. Vishvanath Atmaram, 1 Bom. H. C., App. ix; Fatmabibi v. Advocate-General, I. L. R., 6 Bom., 42; Colgan v. Administrator-General of Madras, I. L. R., 15 Mad., 424.

11 Jewun v. Shah Kubeerood-decu, 2 Moo. I. A., 300; and Bhuggobutty v. Gorroo Prosonno, I. L. R., 25 Cal., 112.

to confer a beneficial estate of an inalienable character. So far as the property is not dedicated to the purpose named, it is subject in the hands of the holders to all the ordinary incidents of property.¹ Notwithstanding that property is validly dedicated to some permanent object with the intention that it shall never be alienated, it does not follow that it may not be alienated in case of necessity.²

18. Where the terms of a transfer of property direct [1]

Direction for acc¹ that the income arising from the property cumulation. shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Exception.—Where the property is immoveable, or [2] where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

Commentary.

Note 1. This section corresponds with section 104 of the Indian Succession Act. The provision, restricting the accumulation of income, owes its origin to the statute known as the Thellusson Act.³ It will be observed however that the section does not, like the English statute, make any exception in favour of provisions for the payment of debts, or for raising portions for children, or touching the produce of timber.

Note 2. The exception is not very clearly stated. Apparently there are two cases where accumulation of a year's income may be directed, namely:—(1) where the property is immoveable; (2) where accumulation from the date of the transfer is directed. If the property is moveable and the transferee is

Exceptions.

1 See *Limji v. Bapuji*, I. L. R., 11 Bom., 441, and other cases cited in Mayne's Hindu Law, § 395; for cases in Muhammadan law see *Mahomed Hamidulla v. Lotful*, I. L. B., 6 Cal., 744; *Phate Sahib v. Damodar*, I. L. R., 3 Bom., 84; *Luchmiput v. Amir Alum*, I. L. R., 9 Cal., 176.

2 See Mayne's Hindu law, § 397.

3 39 & 40 Geo. III, c. 98. See Conveyancing Act, 1881, 44 & 45 Vic., c. 41, s. 42; *Horbin v. Masterman*, [1894] 2 Ch., 184—Compare Trusts Act, section 41.

directed to accumulate the profits arising therefrom for a period not running from the date of the transfer, though ending within a year calculated from that date, the direction would be void. A similar direction would seemingly be valid in the case of immoveable property.

- [1] **19.** Where, on a transfer of property, an interest therein is created in favour of a person *Vested interest.* without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

- [2] *Explanation.*—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

Commentary.

Note 1. The difference between vested and contingent interests is the difference between a transaction into which a condition enters and one in which there is no condition. An interest in property may be declared to arise on the happening of an event which may or may not happen.¹ There is then a condition, and until the fulfilment of it the interest is only contingent. Or the interest may be declared to take effect on the happening of an event which must happen some day, *e.g.*, on the death of any given person. There is then no condition, and therefore the interest may be a vested interest from the first. It is none the less vested because the enjoyment of it is postponed.

With these provisions may be compared section 106 of the Indian Succession Act, which lays down in harmony with English law, that:—

“Where by the terms of a bequest a legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time, unless a

¹ See section 21.

"contrary intention appears by the will, becomes vested in the legatee on the testator's death, and shall pass to the legatee's representatives, if he dies before that time and without having received the legacy. And in such cases the legacy is from the testator's death said to be vested in interest."

In illustration (e) to that section, A bequeaths the whole of his property to B upon trust to pay certain debts out of the income and then to make over the fund to C. On A's death the gift to C becomes vested in interest in him.¹ Similarly, where a fund was bequeathed to trustees to receive the income and apply it to the use of B and after her death to the maintenance of C until she should attain the age of twenty-five years and then in trust for her and her heirs, C was held to have taken a vested interest.²

Note 2. This explanation corresponds with that appended to section 106 of the Indian Succession Act. There is

Explanation.

nothing in any of the provisions mentioned here to show that the vesting of the interest was intended to be contingent on the happening of a future uncertain event. It is a question of construction whether in a given case there is a gift and appended to it a provision postponing enjoyment, or whether the gift itself is made conditional.³ With reference to the last provision it is clear that if an interest is otherwise a vested interest, its accrual cannot be affected by the addition of a condition subsequent, such condition having to do only with the defeasance of an already vested interest; in other words, a liability to be divested does not suffice to postpone the vesting.⁴

20. Where, on a transfer of property, an interest

When unborn person acquires vested interest on transfer for his benefit.

therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

¹ *Jones v. Mackilwain*, 1 Russ., 220; and see *Halifax v. Wilson*, 16 Ves., p. 171.

² Illustration (d) to section 106 of the Indian Succession Act, *Doo d. Cadogan v. Ewart*, 7 Ad. & El., 636; *Gosavi Shivgar v. Rivett*, Carnac, I. L. R., 12 Bom., 453.

³ See in illustration *In re Jobson*, 44 Ch. D., 154.

⁴ *Sreemutty Soorjemoney v. Denobundoo*, 9 Moo. I. A., p. 123, discussed in *Tagore v. Tagore*, 9 Beng. L. R., p. 399, and *Ellokassee Dossce v. Darponarain*, I. L. R., 5 Cal., 59.

Commentary.

There is no section corresponding with this in the Indian Succession Act. It would have been more in place if it had been made to follow immediately on section 14, for the three sections, 13, 14 and 20, have alike to do with the case of an interest created in favour of an unborn person. The result would seem to be that, while the interest so created must exhaust the whole remaining interest of the grantor, the vesting of such interest may be postponed for the time limited in section 14, or, if on his birth the donee acquires a vested interest, the enjoyment of it may be postponed to a later date. Thus construed, sections 19 and 20 might figure as provisos to section 13.

- [1] **21.** Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

- [2] *Exception.*—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Commentary.

Note 1. This section corresponds with section 107 of the Indian Succession Act. It deals with two cases. The condition precedent, on which the vesting of an interest is made to depend, may either be affirmative or negative, the happening or the not happening of an event. Of the former kind of condition, illustration (a) to section 26 gives a simple example. On the event happening the right becomes unconditional and the interest is vested.¹ Of the negative condition precedent, an example is found in illustration (a) to section 27. On the failure of B to execute

the lease within the given time, C's interest vests. As soon as the time for the events happening has expired, or the event has become impossible, the right becomes unconditional and effective.¹

In a case governed by Hindu law a gift was made to several sons with the proviso that, if any one died having no son or son's son, his share should go over to the other and not to the widow or daughter of the deceased son. This gift over was held valid as the donees were in existence. On the contingency happening they were to get an additional benefit.²

Note 2. This exception is also made in the Indian Succession Act.

Exception.

The rule here stated is now in force in England, and it is based on the distinction that 'if futurity is annexed to the substance of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests *instantly*.'³ Page-Wood, V.C., said that the theory on which the authorities relating to the subject go, is that:—

"Where the principal is given at a distant epoch and the whole income is given "in the meantime, the Court leaning in favour of vesting has said that the whole "thing is given: but if there occurs an interval or gap, which separates the gift of "the interest from the principal, it is not vested."⁴

It has however also been said that where the capital is the subject of one gift and the income of another, the vesting is suspended;⁵ and it is not clear from the English cases whether, if only discretionary power, and not a direction, is given to the trustee of the property in question with reference to the income, or if a mere allowance for maintenance out of, and of less amount than, the interest is given pending the falling into possession of the property, the interest is vested⁶ or remains contingent.⁷

1 Compare Contract Act, section 33, and *ante* section 19; Lindley's Thibaut, p. 82.

2 Sreemutty Soorjemoney v. Denobundoo, 9 Moo. (I. A.), 123, explained in Tagore v. Tagore, 9 Beng. L. R., p. 399; and Shoshi v. Tarokessur, I. L. R., 6 Cal., p. 421.

3 Jarman on Wills, 4th ed., p. 837, compare Gosavi Shivgar v. Rivett-Carnac, I. L. R., 13 Bom., 463.

4 Pearson v. Dolman, L. R., 3 Eq., p. 321.

5 See *per* Malins, V.C., in Spencer v. Wilson, L. R., 16 Eq., 512. This decision was dissented from in Bolding v. Strugnell, 45 L. J., Ch., 208, by Jessol, M.R., who said "I do not know of any other case in which the whole income has been absolutely given for maintenance, and yet the legacy has been held not to be vested."

6 Hanson v. Graham, 6 Ves., 239; DeSousa v. Vaz, I. L. R., 12 Bom., 137; and see *In re* Grimshaw's Trusts, 11 Ch. D., 406; Dewar v. Brooke, 14 Ch. D., 529; Barker v. Barker, 16 Ch. D., 44.

7 Leake v. Robinson, 2 Mer., 363.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to members of a class who attain a particular age.

Commentary.

This section corresponds with section 108 of the Indian Succession Act, to which the following illustration is appended :—

“A fund is bequeathed to such of the children of A as shall attain the age of 18 with a direction that while any child of A shall be under the age of 18, the income of the share to which it may be presumed that he will eventually be entitled, shall be applied for his maintenance and education. No child who is under the age of 18 has a vested interest in the bequest.”

The attainment of a certain age is made the condition precedent to the vesting of the property, and those, who at the time when the persons to take have to be ascertained have not attained that age, are excluded.¹

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

Commentary.

The Law Commissioners refer to section 111 of the Indian Succession Act in connection with this section. But it is difficult to see what the rule of construction embodied in that section has to do with the present.² What the object and effect of this section is may be seen from an illustration. Suppose property to be given to A for life with a gift over to B in the event of X going to Benares. The gift over would fail unless X went to Benares in A's life-time, *i.e.*, before the precedent interest ceased to exist. If the precedent interest is not of a terminable nature, *e.g.*, an interest for life, or if the subsequent interest is vested and not contingent, the section obviously has no application. In the

¹ *Maseyk v. Fergusson*, I. L. R., 4 Cal., 304.

² *Howkins on Wills*, p. 254.

case supposed but for the rule laid down in this section the consequence would be that after the expiration of A's interest there would be an interval during which neither A nor B would be entitled.¹ It is to obviate this by limiting the time during which the condition can operate, that the rule is enacted. It may be compared with the rule of the English law of real property which formerly required every contingent remainder to be supported by a particular estate; from which it resulted that the remainder would fail if the particular estate ceased to exist before the happening of the event upon which the remainder could take effect.²

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

Illustration.

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Commentary.

This section corresponds with section 112 of the Indian Succession Act. The case here stated seems to be simply that of a transfer to certain persons provided that they fulfil a certain condition, namely, that of being alive at the date of an event which though certain to happen may happen at any time. On the date of the event occurring the persons to be benefited are to be ascertained. Before the occurrence of the event there is no interest vested in the persons named, and therefore section 19, paragraph 2, has no application. For the case of a gift made to a class of persons who are to be ascertained at some uncertain period no special provision is made. In such a case the persons, who might have

¹ See however *Ajudhia Buksh v. Mussamut Rukmin*, L. R., 11 L. A., 1, where under the circumstances a gift in remainder expectant upon the termination of a life-estate was held to be accelerated and not destroyed by reason of the gift of the life-estate being void.

² See for illustration *Cunliffe v. Brancker*, 8 Ch. D., 393. The rule is no longer of importance in England since 40 & 41 Vic., c. 33. See as to the effect of the intervention of trustees, *Abbiss v. Burney*, 17 Ch. D., 211.

died or be yet unborn on the arrival of the prescribed period would be excluded and the rest would take the whole.¹

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

Illustrations.

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Commentary.

With this section compare sections 113 and 114 of the Indian Succession Act. The condition intended in this section is a condition precedent, that is "such as must happen or be performed before the estate can vest or be enlarged."² When the fulfilment of such a condition is impossible in point of fact or in point of law, the interest in reference to which the condition is precedent fails, and the interest which would have been divested by its fulfilment remains unaffected. Such an illegal or impossible condition is sometimes said to be void; but if that were strictly true it would produce no effect, whereas it does produce the effect of nullifying the transfer.³ It is the transfer which is void, and not the impossible condition on which it is made to depend. Similarly a contingent agreement to do any thing, if an impossible event happens, is void;⁴ and in the above sections of the Indian Succession Act the same rule is laid down with regard to bequests. A condition, not impossible or illegal at the time it is annexed, may become so before the time when it should be fulfilled. For

¹ See note to section 15, and see *Nandi Singh v. Sita Ram*, L. R., 16 I. A., 44.

² 1 Steph. Comm., 8th ed., p. 309.

³ Lindley's Thibaut, lxi.

⁴ Contract Act, section 36.

instance, in illustration (b) suppose that C, instead of being dead at the date of the transfer, died after that date but before B could marry her, the result, it appears, would be the same. The marriage being impossible, the grant would fail.¹ But it is otherwise when the fulfilment becomes impossible by the act of the party to be benefited by the non-fulfilment, as to which see section 34.

It is to be observed that the section deals with the cases where the fulfilment of the condition is impossible or illegal. It can have no reference to those cases where the fulfilment of the condition does not constitute an illegal act, though the condition as such may be regarded as illegal, e.g., a condition not to marry or not to alien.

It is apprehended that the expression "the interest fails," means that in the event mentioned no interest is ever vested in the transferee. When the condition annexed to a grant is not strictly precedent or suspensive and an interest is vested in the grantee, the condition is void and of no effect and the grant irrevocable.²

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations.

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Commentary.

This section corresponds with section 115 of the Indian Succession Act. A distinction has been made between conditions precedent and subsequent in respect of the strictness required in their fulfilment. "Conditions subsequent that go in defeasance shall be taken strictly for they are odious,"³ and so in section 29 it is provided that unless the condition is strictly fulfilled, the ulterior disposition shall not take effect. While as to conditions precedent it is said that "as the estate cannot commence until the condition is performed, the condition is

1 Lindley's Thibaut, lxiii.

2 See further as to illegal and immoral conditions, note to section 6 (h) (2).

3 Scott v. Tyler, 2 W. & T. L. C., 6th ed., p. 146.

beneficial as creating an estate and ought to be construed favourably."¹ It is necessary that the person to whom the grant is made should put himself into a position to answer the description of the person to take. That he was ignorant of the condition to be performed is no excuse.² But if what is required has been substantially done, it has been held to be immaterial that it was not done exactly in the manner prescribed. For instance it seems to have been held that where a consent in writing is prescribed, an oral consent would be sufficient,³ and so in the case stated in illustration (a).

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations.

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which made it impossible to prove that she died before him. The disposition in favour of B does not take effect.

Commentary.

This section corresponds with sections 116 and 117 of the Indian Succession Act. In the case from which illustration (b) is taken, Lord

¹ *Scott v. Tyler*, 2 W. & T. L. C., 6th ed., p. 189.

² *In re Hodges' Legacy*, L. R., 16 Eq., 92; *Astley v. Earl of Essex*, L. R., 18 Eq., 290.

³ *Scott v. Tyler*, 2 W. & T. L. C., 6th ed., p. 199; *Lindley's Thibaut*, lxiii.

Cranworth, after referring to cases in which the second gift was allowed to take effect although the prior gift had altogether failed, says :¹

" But these cases all proceeded on the doctrine that the event on which the gift "over was to come into operation was an event impliedly if not expressly indicated by " the language used in the will."

and goes on to add that, if the grantor had in his mind the extremely improbable event which occurred, and desired B still to take the property, he would not have relied on the words actually used, but he would have made express provision to accomplish his object. However, in the case of a gift to A for his life and after his death to B, the Privy Council held that on the gift to A proving void the subsequent gift was accelerated and not destroyed.²

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

Ultior transfer conditional on happening or not happening of specified event.

Commentary.

This section corresponds with section 118 of the Indian Succession Act, to which several illustrations are appended. The conditions contemplated by this section are in the nature of conditions subsequent, and they have for their object to control and alter the interest or the order of limitation originally prescribed. For instance, a clause of cesser may be made to operate in case the person in whom the interest primarily vests changes his religion,³ or adopts a professed religious life,⁴ or dies

1 Underwood v. Wing, 4 De G. M. & G., 604, in which case the onus of proving that the prior interest had failed in such a manner as to enable the subsequent provision to operate rested on B. See also as to this *In re Green's Settlement*, L. R., 1 Eq., 288.

2 Ajudhia Buksh v. Mussamut Rukmin, L. R., 11 I. A., 1.

3 Seymour v. Vernon, 10 Jur., N. S., 487.

4 Biddulph v. Lees, 23 L. J., Ch., 211 ; see also Egerton v. Brownlow, 4 H. L. C., 210 in which the shifting clause was held void as opposed to public policy.

not having attained a certain age.¹ In a case governed by Hindu law a gift was made to several sons with the proviso that, if any son died leaving no son or son's son his share should go over to the others and not to his widow or daughter. This gift over having the effect of conferring an additional benefit on existing donees was held valid.² It will be observed that the dispositions referred to are not made subject to section 26, since the condition, which is precedent as regards the later, acts in defeasance of the prior interest; it must therefore be construed strictly like all conditions subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fulfilment of condition subsequent.

Illustration.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

Commentary.

This section corresponds with section 119 of the Indian Succession Act and the illustration with that there given as illustration (c). As noticed above, it is a general rule of English law that conditions subsequent which are intended to defeat vested interests are to be construed strictly.³

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration.

A transfers a farm to B for her life, and, if she do not desert her husband to C. B is entitled to the farm during her life as if no condition had been inserted.

Commentary.

This section corresponds with section 120 of the Indian Succession Act. The ulterior disposition may fail, either because the condition on which it depends is not valid within the meaning of section 32 or for other reasons, e.g., because it is too remote, or because it offends against

¹ *Maseyk v. Fergusson*, 1 L. R., 4 Cal., 304.

² *Soorjeemoney v. Denobundo*, 6 Moo. I. A., 553, see note to section 21.

³ *Clavering v. Ellison*, 3 Drew, 451; see *ante* p. 71.

section 13. If a condition subsequent is either illegal or impossible (section 25) it is inoperative, in other words the grant is absolute or unconditional. With reference to the ulterior disposition the condition is a condition precedent, and that disposition fails according to the provision of section 25. Illustrations of such conditions are given under section 120 of the Indian Succession Act.

31. Subject to the provisions of section twelve, on a condition that, transfer of property an interest therein may be created with the condition super-added, that it shall cease to exist in case a specified uncertain event happens or does not happen.

Illustrations.

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Commentary.

This section corresponds with section 121 of the Indian Succession Act. Provided that the condition is not the grantee's becoming insolvent or endeavouring to transfer or dispose of the property,¹ it may be granted subject to a condition subsequent, affirmative or negative. It must be added that a condition subsequent can only operate within the limits prescribed by the rule against perpetuities and subject to the rule contained in section 23.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Commentary.

This section corresponds with section 122 of the Indian Succession Act, and lays down the rule that a condition will fail to operate unless it

¹ Subject to the provisions with regard to absolute interests and leases in sections 11 and 12 respectively.

possesses the legal attributes required by section 25 for a valid condition precedent.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

Commentary.

This section corresponds with section 123 of the Indian Succession Act, and may be compared with section 34 of the Contract Act, which provides that where the event upon which a contract is contingent is the future conduct of a living person it shall be considered to become impossible, when he does anything which renders it impossible that he should act in the manner contemplated within any definite time, or otherwise than under further contingencies. The case supposed is one where a condition precedent and affirmative is imposed. The grant fails when the performance of the condition has been prevented by the person interested in the performance, *i.e.*, by the intended grantee; see the illustrations appended to the corresponding section of the Indian Succession Act.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in

Transfer conditional on performance of act, time being specified.

the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Commentary.

This section, except the proviso, corresponds with section 124 of the Indian Succession Act. The case supposed is one in which the fulfilment of the condition, whether precedent or subsequent, is prevented by the person interested in its non-fulfilment. In such a case the non-fulfilment of the condition is excused, or the condition is discharged. It is on the principle that, no man is suffered to take advantage of his own wrong that relief is thus given to the party to whose interest it is that the condition should be fulfilled.¹

Election.

35. Where a person professes to transfer property [1]

Election
necessary.

when which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations.

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must, out of the Rs. 1,000, pay Rs. 800 to B.

¹ Edwards v. Aberayron Mutual Insurance Society, 1 Q. B. D., 563.

- [2] The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.
- [3] A person taking no benefit directly under a transaction but deriving a benefit under it indirectly, need not elect.
- [4] A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.
- [5] *Exception to the last preceding four rules.*—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.
- [6] Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.
- [7] Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.
- [8] Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has hereby confirmed the transfer of the estate to B.

- [9] If he does not within one year after the date of the transfer signify to the transferor or his representatives his

intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed [10] until the disability ceases, or until the election is made by some competent authority.

Commentary.

This section corresponds with sections 167 to 177 of the Indian Succession Act.

* **Note 1.** The doctrine of election has for its purpose to carry out the intention expressed by the grantor in the instrument of grant, and it rests on the principle that "there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions and renouncing every right inconsistent with them."¹ The doctrine is most frequently applied to cases of wills, but this section agrees with English law in declaring it to be also applicable to cases of disposition *inter vivos*.² It thus operates generally to prevent a person whose property another attempts to transfer from taking a benefit under any instrument or transaction, in which such transfer is attempted, without acquiescing in it. Lord Redesdale expressed the rule in the following words:—

"The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which Courts of equity in particular have grounded a variety of expressions in cases both of deeds and of wills, though principally in cases of wills, because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires."³

1 *Streatfield v. Streatfield*, 1 W. & T. L. C., 6th ed., p. 397, where the English cases on the subject are collected: see also *Mangaldas v. Ranchhoddas*, 1 L. R., 14 Bom., 438, where the doctrine of election was applied in the case of the will of a Hindu widow purporting to dispose of land inherited from her husband; see *Ranganna v. Atchanna*, 4 Moo. I. A., 103.

2 *Green v. Green*, 2 Mer., 86, and cases next cited.

3 *Birmingham v. Kirwan*, 2 Sch. & Lef., 449; see *Codrington v. Lindsay*, L. R., 8 Ch., 578, where Lord Selborne collects the various authorities as to deeds.

The same principle has frequently been enunciated in Indian cases.¹ As it is for the purpose of effectuating the intent of the grantor that the grantee is put to his election, it would naturally follow that the grantor might, by declaring his intention that the doctrine of election should not operate, relieve the grantee from the obligation which it involves. Accordingly in England it has been said that “while the general and presumed intention (of the grantor) is not repelled by showing that the circumstances which in the event gave rise to the election were not in the contemplation of the author of the instrument, it is evident in principle that it may be repelled by the declaration in the instrument itself of a particular intention inconsistent with the presumed general intention.”² Although in the present section there are no words providing for such a case, it can hardly be doubted that a transferor may by the use of apt words exclude the operation of the section as he may in the case of any other rule of construction founded on the supposed intent of the party making the instrument. It is only where rules founded on public policy are concerned that parties cannot by change of expression withdraw the case from their operation.³

It is not as between several dispositions contained in the same instrument that a case for election arises, but as *When a case for election arises.* between one claim in virtue of, and another without and adverse to, the transaction or instrument in question. Thus in a recent case it was held that no election need be made by beneficiaries under a will between one clause in the instrument and another clause in the same instrument.⁴ Further, no case of election arises where the benefit conferred on the owner of the property attempted to be disposed of is the payment of a debt due to him from the transferor.⁵ The most important exceptions from the operation of the doctrine are contained in the remaining paragraphs of the section. As would appear from illustrations (b) and (c) to section 169 of the Indian Succession Act, where the illustration to this section is also given, the doctrine of election is applicable to contingent interests under a will,⁶ and it may be presumed to apply to them similarly in cases within the purview of this Act.

¹ *Forbes v. Amcerooniassa*, 10 Moo. I. A., p. 340; see also *Shah Mokhun Lall v. Baboo Kishen Singh*, 12 Moo. I. A., p. 186.

² *In re Vardon's Trust*, 31 Ch. D., pp. 275, 297; *Cooper v. Cooper*, L. R., 7 H. L., 53; *Smith v. Lucas*, 18 Ch. D., 531; *Hamilton v. Hamilton*, [1892] 1 Ch., 400.

³ *Bollairs v. Bellairs*, L. R., 13 Eq., p. 516.

⁴ *Wollaston v. King*, L. R., 8 Eq., 165; *Wallinger v. Wallinger*, L. R., 9 Eq., 301.

⁵ *Kidney v. Coussmaker*, 12 Ves., 136.

⁶ *Webb v. Shaftesbury*, 7 Ves., 480.

Where a case for election has arisen, the election of a person having a prior interest does not bind another entitled in remainder;¹ and similarly where each member of a class has a distinct right of election, none is bound by the decision of the majority.² The rules as to the manner and conditions of election are given in the last paragraphs of the section.

The proviso corresponds with section 168 of the Indian Succession Act.

In declaring the results which ensue on an election being made against the instrument or transaction in question, the section departs materially from the rules laid down in English Courts. Where the transfer is gratuitous and the transferor has before the election become incapable of making a fresh transfer, the case is closely analogous to that of a will; it is accordingly governed by the same rules and the disappointed transferee has a claim for compensation. And in every case where he has given consideration for the transfer, which is defeated by the election, the matter is one of contract and he similarly has a consequent claim for compensation. Subject only to these claims, it is here provided that the interest which the person who, being put to his election and preferring to retain his own property, declines to accept, "shall revert to the transferor or his representatives as if it had not been disposed of." In this respect the Act, like the Indian Succession Act, reproduces the view which was expressed in the earlier English cases as to the results of an election hostile to the instrument or transaction. By the modern cases however it has long been settled that a donee by electing against the instrument does not incur a forfeiture of the benefit conferred on him by it, but is merely bound to make compensation out of it to the person disappointed by his election. The result of the cases has been stated in these terms:—"1st. That in the event of election to take against the instrument Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints. 2nd. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right."³

This section contains no provision corresponding with section 170 of the Indian Succession Act: the principle which that section embodies

1 Long v. Long, 5 Ves., 445; see also Hutchison v. Skelton, 2 McQ., H. L. C., 492.

2 Fytche v. Fytche, L. R., 7 Eq., 494.

3 See note to Gretton v. Howard, 1 Swanst., 438.

is however implied in the present paragraph. That section is as follows:—

"A bequest for a man's benefit is, for the purpose of election, the same thing as "a bequest made to himself."

And in the illustration appended to it, the benefit is conferred by the creation of a trust for the payment of debts due from the person put to his election.

Note 2. This paragraph corresponds with section 169 of the Indian Succession Act. There must be deducible from the instrument itself a clear intention to dispose of property in fact belonging to the person whom it is attempted to put to his election; but it is not necessary to prove that the transferor was aware that it was not his own.¹ Thus if the attempted transfer is by way of the exercise of a power, as if it were general, when it is in fact limited, it is not necessary in order to raise a case for election that the donee of the power should have known that he was not exercising it properly.

No election arises when benefit is given indirectly;

Note 3. This paragraph corresponds with section 171 of the Indian Succession Act, to which the following illustration is appended:—

"The lands of Sultanpur are settled upon C for life, and after his death upon "D, his only child. A bequeaths the lands of Sultanpur to B and 1,000 rupees to C. "C dies intestate shortly after the testator and without having made any election. "D takes out administration to C, and as administrator elects on behalf of C's "estate to take under the will. In that capacity he receives the legacy of 1,000 "rupees and accounts to B for the rents of the lands of Sultanpur which accrued "after the death of the testator and before the death of C. In his individual "character he retains the lands of Sultanpur in opposition to the will."

The rule is usually illustrated by the case of *Lady Cavan v. Pulteney*.² In this case a lady elected to take a certain estate under a will which purported to dispose of her property and that of her husband; and it was held that the benefit which the husband consequently took as tenant by the curtesy did not raise a case for his election. Here the benefit taken by the husband was clearly both indirect and derivative.

In the cases contemplated by this paragraph the person who derives the indirect interest does so by reason of an incident to the property belonging to the person through whom it is derived, and it is thus not a benefit conferred by the person professing to transfer property which he has no right to transfer on the owner of such property within the meaning of the first paragraph of this section.

¹ 1 Countess v. Acworth, L. R., 9 Eq., 519; *In re Brooksbank*, 34 Ch. D., 160.

² 2 Ves., Jun., 544; 3 ib., 384.

Note 4. This paragraph corresponds with section 172 of the Indian Succession Act, to which the following illustration *or to a person in a second capacity.* is appended :—

“The estate of Sultanpur is settled on A for life, and after his death upon B. A leaves the estate of Sultanpur to D, and 2,000 rupees to B, and 1,000 rupees to C, who is B's only child. B dies intestate, shortly after the testator, without having made an election. C takes out administration to B, and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2,000 rupees. C may do this, and yet claim his legacy of 1,000 rupees under the will.”

Of course trustees, administrators, &c., may elect in one way for their beneficiaries, &c., and in another for themselves. Strictly speaking, however, they do not as a rule take any benefit when acting as such trustees, &c., and this paragraph was probably inserted for the purpose of removing all doubt as to the applicability of the rule in *Lady Oavan v. Pulteney*.¹

Note 5. This paragraph corresponds with the exception to section 172 of the Indian Succession Act, to which the following illustration is appended; it is also in harmony with the English rule.²

Exception. “Illustration.—Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200*l.* during her life in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000*l.* The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, but not the legacy of 1,000*l.*”

Note 6. This paragraph corresponds with section 173 of the Indian Succession Act. In the first of the illustrations appended to that section the person to elect not being aware of his right to the property bequeathed away from him, took the benefit conferred on him;³ and in the second, he had been misinformed by the executors as to the value of the bequest to himself, and consequently he had in both cases allowed the other beneficiary to take possession under the will. In neither case had he duly confirmed the bequest to the other beneficiary.

¹ 2 Ves., Jun., 544; 3 *ib.*, 384: for the case where one of the claims of the person put to his election is under letters of administration, see *Grissell v. Swinhoe*, L. R., 7 Eq., 291, explained in *Cooper v. Cooper*, L. R., 6 Oh., p. 21; a.c., L. R., 7 H. L., pp. 53, 75.

² *East v. Cook*, 2 Ves., Sen., 30, cited and commented on by James, L.J., in *Wilkinson v. Dent*, L. R., 6 Oh., 341.

³ *Padbury v. Clark*, 2 Mac. & G., 298.

An election may be either express or implied, and if it has been made under a misconception it may be revoked.¹ In order to presume an election from the acts of any person, he must be shown to have been aware of his duty to elect,² and, it seems, to have intended to perform it, and to have had full knowledge of such matters as the value of the different properties and his own rights in respect of them,³ unless he can be said to have waived the inquiry which would have resulted in such knowledge. It should be added that generally acts of implied election, which bind the person put to his election, will also bind his representatives;⁴ but, if the election has not been explicit and the other party can be placed in the same position as if the benefits had not been accepted, the representatives may renounce the benefits and elect for themselves.⁵ Once fully made, an election is final.⁶

Note 7. This paragraph corresponds with section 174 of the Indian Succession Act. In case of one or both of the two properties being reversionary, it would seem that the period of two years will not begin to run before both fall into possession, as until then they cannot be enjoyed.⁷

Note 8. This paragraph corresponds with section 175 of the Indian Succession Act. The rule here set out may be referred to the general principle of English law that a contract cannot be avoided where it has become impossible for the parties to be placed in the same position as if it had never been made.⁸

Note 9. This paragraph corresponds with section 176 of the Indian Succession Act. In England no time is fixed by law within which an election must be made. But when a time is specially limited the person, who should elect and fails to do so within that time, is deemed to have elected to take against the instrument.⁹

1 *Kidney v. Coussmaker*, 12 Ves., 136; *Worthington v. Wigington*, 20 Beav., 67; *Tribhovandas v. Smith*, 1 L. R., 20 Bom., 316.

2 *Briscoe v. Briscoe*, 7 Ir. Eq. R., 123.

3 *Wilson v. Thornbury*, L. R., 10 Ch., 239; *Worthington v. Wigington*, *supra*.

4 *Dewar v. Maitland*, L. R., 2 Eq., 834.

5 *Dillon v. Parker*, 1 Swanst., 385.

6 See *Scarf v. Jardine*, 7 App. Cas., p. 360, and note to section 112.

7 *Padbury v. Clark*, 2 Mac. & G., 298.

8 *Streatfield v. Streatfield*, 1 W. & T. L. C., 6th ed., p. 431; *Synd Taleb Hossein v. Shaikh Arkeor Baksh*, 22 W. R., 259; *Muhammad Mohidin v. Ottayil Ummache*, 1 Mad. H. C., 390.

9 *Streatfield v. Streatfield*, 1 W. & T. L. C., 6th ed., pp. 420, 429; and see *decree*, 1 Swanst., 447.

Note 10. This paragraph corresponds with section 177 of the Indian Succession Act.

Apportionment.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

Commentary.

In this section the provisions of the English Apportionment Act of 1870¹ are expressed in a condensed form. There is no definition in the present Act, or in the General Clauses Act, of the terms rents, annuities, pensions, dividends. The above statute defines annuities to include salaries, and dividends to include all payment made out of the revenue of trading and other public companies, but not payments in the nature of a return or reimbursement of capital;² and it has been held that the profits of private companies are not within the purview of the clause.³ Questions may arise as to the extension to be given to the words 'periodical payments in the nature of income.' If they mean 'payments coming due at fixed periods,' a case decided under a previous Apportionment Act, in which the latter expression is used, may be cited as establishing that this section does not apply to such payments as royalties payable under mining leases in respect of the ore as it is raised from the mine.⁴ Under the same Act it was held that dividends payable by a Joint Stock Company did not come within its operation.⁵ On the other hand it is conceived that this section, like the statute of 1870, is applicable to such salaries as are susceptible of assignment.⁶

1 33 & 34 Vic., c. 35.

2 Such payments of course are not 'in the nature of income,' but it seems that bonuses are so; see *Plumber v. Neild*, 6 Jur., N. S., 529.

3 *Carr v. Griffith*, 12 Ch. D., 655.

4 *St. Aubyn v. St. Aubyn*, 1 Drew. & S., 613; s.c., 30 L. J., Ch., 917, decided under 4 & 5 Will. IV., c. 22.

5 *In re Maxwell's Trusts*, 1 H. & M., 610.

6 See *ante* p. 35.

The apportionment is, in the first place, to operate only as between the transferor and the transferee, and the person liable to make the payment remains liable for the entire sum payable to the person who would be entitled to it if there were no apportionment.¹ The transferor and transferee cannot separately resort to him, each for an apportioned part of the rent, &c. The purchaser from a lessor is entitled to recover from the lessee the entire arrear of rent falling due after the date of the transfer.² If before the transfer of property subject to a lease, the transferor has agreed with the lessee to take rent in advance for a certain time, the transferee would take subject to such agreement and there would be no apportionment. For the time fixed the lessee would be under no liability to the transferee.³

Interest payable in respect of money lent is not mentioned in this section, because in its nature it accrues due from day to day, and therefore does not need to be apportioned.⁴

The apportionment of annuities on death is provided for in the Indian Succession Act, Part xxxvi.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge

¹ *Satyendra v. Nilkantha*, 1 L. R., 21 Cal., 383.

² See sections 8 and 109.

³ *Chooramun v. Mussamut Patoo Kooer*, 24 W. R., 68.

⁴ See section 8.

it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the Official Gazette so directs.

Illustrations.

(a) A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30, and delivery of one fat sheep, B having provided half the purchase-money and C and D one-quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation. E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

Commentary.

On the partition of property which is held subject to a lease, or when a transfer of part of such property takes place, the several persons who become entitled to the rent *prima facie* take it in shares proportionate to their interest in the property. In order that they should have the benefit of this right, a corresponding severance of the obligation on the part of the person liable to make the payment is necessary, and according to the section this severance is to follow on reasonable notice of the severance of the tenure being given to the person bound to pay.

The rule previously in force as laid down by the Full Bench in Calcutta¹ was not quite the same. It was held that, on the sale of a fractional share of a tenure let out to a tenant in its entirety, the tenant was justified in paying the rent to the persons jointly entitled, until the purchaser took steps to effect an apportionment of the rent, and that such apportionment, if not amicably effected, might be enforced by suit. Now under the section it would seem that, on a mere notice of the severance without notice of the transferee's intention to demand his proportionate share of the rent separately, an obligation to pay such share would arise. In the Full Bench case the suit was dismissed because the purchaser had not taken any proper steps to make arrangements with the tenant, or to obtain an apportionment of the rent. In a suit for the apportionment of the rent all the co-sharers should be made parties.*

¹ Ishwar Chunder v. Ramkrishna, I. L. R., 5 Cal., 902; Lootfulhuck v. Gopee Chunder, *ib.*, p. 941; and see Ram Nath v. Gondee, 10 W. R., 441.

² Ishwar Chunder v. Ramkrishna, *supra*.

Other cases of obligations, the benefit of which relates to property are given in the note to section 40. The Easements Act¹ makes similar provision for the case of apportionment on division of the dominant heritage.

The section provides only for cases where the benefit of the obligation passes from one to several owners of the property, and does not apply to those where the apportionment of the rent or other severance of the duty may be desirable in the interests of the persons liable. Thus, for instance, where an estate held subject to a single rent or other charge is divided among several persons otherwise than by way of sub-demise, the latter would be jointly and severally liable to the owner of the rent or charge for the entire sum. The rent could not be apportioned on the various parcels, and the liability to discharge it severed, without the consent of the person entitled to enforce the obligation. In a case where certain villages, composing a *maganam* or sub-division, which had been granted in perpetuity by a zemindar at a fixed rent, came into the hands of various purchasers under decrees obtained against the heirs of the grantee, and the zemindar sued those purchasers as being jointly and severally liable for the rent of the *maganam*, the Court apportioned the rent due on the *maganam* upon the several villages and decreed payment of proportionate rent by the defendants severally. The High Court of Madras upheld this decision, observing that there was no foundation for the contention that the defendants were jointly and severally liable for the rent and suggesting that it might be otherwise in the case of a grant to several persons on a single rent like *agraharams* or *dharmanasanam* villages.² Similarly the obligation undertaken by a mortgagor is not, on a division of the mortgagee's interest among several persons, to be taken as severed, so that each of the several holders can claim his share of the mortgage-money, see notes to sections 60 and 67.

(B).—*Transfer of Immoveable Property.*

38. Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they

Transfer by person authorized only under certain circumstances to transfer.

¹ Act V of 1882, section 30.

² *Ramnad Zemindar v. Ramamany*, I. L. R., 2 Mad., 234.

shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Commentary.

Although this part of the Act is not to be deemed to affect any rule of Hindu law, the section is, as the illustration suggests, partly founded on cases arising under Hindu law.¹ The cases covered by this section are those in which the vendor, not being ostensible owner nor purporting to be absolutely entitled, has, under the circumstances asserted by him to exist, the power to dispose of the property. A trustee, executor, mortgagee,² or other person having a power of sale, might fill the character of a person "authorised to dispose of property under circumstances in their nature variable." It has been held that all that can reasonably be required of a *bonâ fide* purchaser for value from a devisee on trust for the payment of debts, is that he should apply to the executor, if the devisee is not himself executor, and ask if the necessity for the sale has arisen.³ Even the pendency of a creditor's suit does not prevent the executor selling the estate to pay debts.⁴ What is 'reasonable care' must of course depend on the circumstances. But clearly the purchaser being put to an inquiry must pursue it so as not to be fixed with notice of the absence of circumstances justifying the sale within the meaning of section 3, paragraph 3.

To the case of purchasers ignorant of the trust and taking from the trustee in good faith for value, the section does not apply. Such purchasers are protected by section 64 of the Indian Trusts Act and section 41 of this Act.

¹ Mayne's Hindu Law, § 323.

As to the case of mortgagees, see section 69.

³ Lewin on Trusts, 8th ed., pp. 450, 451; *Bazayet v. Dooli Chand*, I. L. R., 4 Cal., 402; *Greender v. Mackintosh*, *ib.*, p. 897.

⁴ *Price v. Price*, 35 Ch. D., 297; see section 52 as to *lis pendens*.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

Illustration.

A, a Hindu, transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

Commentary.

The right of the third person protected by this section is neither a proprietary right in the land nor a right arising out of contract, not amounting to an interest in immoveable property, such as is mentioned in the second paragraph of section 40. Except that the right cannot be made to avail generally against the property of the person subject to the obligation, it would be difficult to distinguish it from the right of an ordinary creditor, for which provision is made in section 53. It has been decided that a person entitled to maintenance under Hindu law does not by virtue of that right alone acquire any lien on the family property in the hands of the persons holding it, and that therefore his claim cannot be enforced against an alienee for value of the property; it is only when the purchaser takes with notice of the vendor's intention to defeat the claim to maintenance, that the property can be made liable in his hands.¹ But when a decree has been made charging certain property with maintenance, the decree-holder acquires a lien on that property available against any person in whose hands it may be.* A distinction which the illustration fails to mark, is drawn between an

¹ Mayne's Hindu Law, § 419, *et seq.*

² Lakshman v. Satyabhamabai, I. L. R., 2 Bom., p. 494; *secus* if the decree is personal, Adhiranee v. Shona, I. L. R., 1 Cal., 365; Muttia v. Virammal, I. L. R., 10 Mad., 283. To enforce the charge a suit must be brought, see section 100 and note.

alienee who, merely knowing of the widow's claim, is not aware that any wrong will be wrought upon her by the sale, and the alienee who has "notice of the existence of a claim likely to be unjustly impaired by the proposed transaction." If the alienation is voluntary, the widow's right to follow the property is clear. But against a purchaser for value, something more than mere notice of the claim, namely, the absence of *bona fides*, has also to be proved. On the principle involved in this section, it seems that an alienation by a husband of property in respect of which his wife is entitled in equity to a life-interest, would be set aside only if it be made by him fraudulently with a view of defeating that interest, or to a gratuitous transferee.¹

Of the same character with the rights protected by this section, is the right of a creditor against the property of his deceased debtor. He has no absolute right to follow it into the hands of strangers. But he is entitled to do so against a purchaser who is proved to have known "that there were debts of the ancestor or testator left unsatisfied, and also that the heir or devisee to whom he paid his purchase-money, intended to apply it otherwise than in the payment of such debts." Pontifex, J., lays down this proposition as equally true here and in England.

'Provision for marriage' presumably has reference to the expenses enjoined by Hindu law for the marriages of the unmarried female members of the family, such expenses, like those to be incurred for certain ceremonies, being spoken of with maintenance as charges on the inheritance.² 'Advancement' is doubtless used in the English sense pre-supposing therefore a settlement or a will.

40. Where, for the more beneficial enjoyment of his [1] own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

Burden of obligation imposing restriction on use of land,

¹ Tidd v. Lister, 10 Hare, 140; Murray v. Elibank, 2 W. & T. L. C., 6th ed., pp. 498, 514.

² Greender v. Mackintosh, 1 L. R., 4 Cal., p. 907, following Corser v Cartwright, L. R., 7 H. L., 731; see also West of England Bank v. Murch, 23 Ch. D., 138; Bazayet v. Dooli Chund, 1 L. R., 4 Cal., 402.

³ Lakshman v. Sarasvatibai, 12 Bom. H. C., p. 77.

- [2] where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration.

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C who has notice of the contract. B may enforce the contract against C to the same extent as against A.

Commentary.

Note 1. The right here provided for is the same as that to which the proviso to section 11 refers. It may be acquired by contract, as for instance, where the owner of property, while selling part of it, exacts from the purchaser a covenant that he will not use the part so purchased in any but a particular way. Only against purchasers with notice of such covenant, could he enforce the terms of it. The leading case on the point is *Tulk v. Moxhay*,¹ which established that such covenants as those in question are valid otherwise than as merely personal covenants between the original parties, in spite of the rule against perpetuities. There the plaintiff, being owner of a vacant piece of ground called Leicester Square and of several houses surrounding it, sold Leicester Square to one Elwes, he covenanting that he would keep the ground "in its then form, in an open state, uncovered with buildings." The defendant who had become purchaser of the Square, though he admitted notice of this covenant, declared his intention to build upon it, and thereupon a bill was filed against him by the plaintiff who still retained several of the adjoining houses. Lord Cottenham, giving judgment for the plaintiff, said :—

"That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using it in a particular way, is what I never know disputed."

And he proceeded to rule that a third person purchasing from the original vendee is in the same position :—

“If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.”¹

Where the covenant is made by the vendor for the common benefit of those who purchase the estate in lots, he is regarded as a trustee in respect of the covenant for their benefit. Each of them can therefore compel its observance as if he were an equitable assignee of it. “Each has an equitable right,” it has been said, “to enforce against the other the obligation stipulated for in his interest and serving as a part of his inducement (as the other knew) to the contract.”² In a recent English case it was laid down that :—

“When an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question whether it is intended that each of the purchasers shall be liable in respect of those restrictive covenants to each of the other purchasers, is a question of fact to be determined by the intention of the vendor and the purchasers.”

And it was added that if the vendor does not reserve any part of the estate himself, that is almost if not quite conclusive that the covenants which he takes from the purchasers are intended for the benefit of each purchaser, who can therefore in a Court of equity insist on their fulfilment by the others without introducing the vendor into the matter.³

The principle that a purchaser of a property from another, with knowledge of a previous contract lawfully made by him with a third person to use the property in a particular way, shall not to the damage of the third person and in opposition to the contract use the property in a manner not allowable to the seller, has been extended in England to cases not falling within the proviso to section 11. For instance, where the defendant bought land with notice of a covenant entered into by his vendor with the plaintiff to the effect that, if any beer-shop were erected on the land, the plaintiff, his heirs and assigns, should have the exclusive right of supplying beer, and the plaintiff, alleging that he had always been ready and willing to supply good beer at a fair price, complained

1 2 Phill., p. 778; see also *McLean v. McKay*, L. R., 5 P. C., 327; see note 2 to section 11.

2 *Cooverji v. Bhimji*, I. L. R., 6 Bom., 528, per West, J.; *Dart's Vendors and Purchasers*, 6th ed., p. 863.

3 *Nottingham Patent Brick, &c., Co. v. Butler*, 16 Q. B. D., 778; see also *Martin v. Spicer*, 34 Ch. D., 1, affirmed in the House of Lords, 14 App. Cas., 12; and *Collins v. Castle*, 36 Ch. D., 243.

of a breach of the covenant by the defendant; it was held that the covenant was binding on him and was not void because it purported to be perpetual. The interest which the plaintiff had in the land was that of a brewer and not that of the owner of adjacent land.¹

It will be observed that the covenant in *Tulk v. Moxhay* was of a restrictive character; and in later English cases it has been held that the doctrine of that case does not apply where the covenant is of an active character involving the expenditure of money, for instance a covenant to repair; except where the case is one of landlord and tenant.² It must be noted that the covenantee or his representative in title may be estopped from enforcing the covenant, as by acquiescing in such an alteration in the character of the property or its neighbourhood as would render it inequitable to enforce it.³

Although a purchaser without notice of a restrictive covenant can give another a title free from the restriction, the latter cannot be compelled to take such a title. Specific performance will not be decreed against a purchaser when the title depends on such disputable matter of fact as absence of notice in the vendor, for, though the title might be good, it would probably not be established without a law-suit.⁴

The obligation of a purchaser to respect restrictive covenants of which he has notice, has no reference to the question whether the covenant runs with the land. As to such covenants the Act is silent; and it seems that except in the case of landlord and tenant, the burden of a covenant never, according to English cases, runs with the land.⁵ Where there is a grant as of an easement, it avails against all the world, but a mere covenant affects only those who take with notice and does not run at law with the servient tenement.⁶ With regard to covenants running with the land, the English Real Property Commissioners said in their third Report:—

“The authorities lay down: 1st, that in order to make a covenant run strictly “with the land, so as to bind the assignee, or give him the benefit without his being

1 *Catt v. Tourle*, L. R., 4 Ch., 654.

2 *Haywood v. Brunswick, &c., Society*, 8 Q. B. D., 403; see also *Andrew v. Aitken*, 22 Ch. D., 218; *Austerberry v. Corporation of Oldham*, 29 Ch. D., 750; *Clegg v. Hands*, 44 Ch. D., 503.

3 *Bedford v. Trustees of the British Museum*, 2 M. & K., 552; *London C. & D. Railway Co. v. Bull*, 47 L. T., N. S., 413; *Sayers v. Collyer*, 28 Ch. D., 103.

4 *Nottingham Patent Brick, &c., Co. v. Butler*, 16 Q. B. D., 108.

5 *Spender's Case*, 1 Smith's L. O., 9th ed., 65; *Austerberry v. Corporation of Oldham* (*supra*).

6 *Leech v. Schweder*, L. R., 9 Ch., pp. 475, 476.

"named, it must relate directly to the land, or to 'a thing in existence parcel of the demise': 2ndly, that where it respects a thing not in existence at the time, but which when it comes into existence will be annexed to the land, the covenant may be made to bind, the assigns by naming them, but will not bind them unless so named: and 3rdly, that when it respects a thing not annexed nor to be annexed to the land, or a thing collateral or in its nature merely personal, the covenant will not run, that is, it will not bind the assignee nor pass to him even though he is named."

These rules appear to have been originally laid down with reference to leases; but authorities are not wanting, in which they have been treated as applying equally to cases not involving the relation of landlord and tenant.¹

Note 2. Of the obligations referred to in this paragraph, an instance is given in the case of a contract for sale of land under which the purchaser, though he acquires no interest therein, does become possessed of a right which is available against any person afterwards buying the same land with notice. As the contract of sale can be enforced against the vendor and his representatives, so it may be enforced against other persons who claim by title arising subsequently to the contract, except purchasers for valuable consideration, who have actually paid their money. When once a man has in good faith paid money without notice of any other title, he is at liberty to get in the legal title and hold it, if he can, though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing "inconsistent with the good faith of the dealing with himself."²

A suit for specific performance will lie notwithstanding that the purchaser who resists the claim has a registered conveyance in his favour, while the document on which the plaintiff relies is unregistered.³ The action will not lie at the suit of a vendor who previously to entering into the contract has made a settlement of the same property, nor at the suit of a purchaser who previously to the contract had notice of such settlement, although in either case the settlement may

¹ These rules must be taken subject to equitable rules as to notice, &c., see, e.g., *Renals v. Cowlishaw*, 11 Ch. D., 866; *Tulk v. Moxhay*, 2 Ph., 774; s.c. 11 Beav., 571; *Clegg v. Hands*, 44 Ch. D., 504.

² *Blackwood v. London Chartered Bank of Australia*, L. R., 5 P. C., 92; *Taylor v. Russell*, [1891] 1 Ch., 8.

³ *Kavar v. Ismail*, I. L. R., 9 Mad., 119; *Chundernath v. Bhojrab*, I. L. R., 10 Cal., 250; *Chunder Kant v. Krishna*, I. L. R., 10 Cal., 710, and other cases cited in note 5 to section 54, and see Specific Relief Act, section 27 (b).

be a voluntary one.¹ There may be some doubt whether notice is required to affect with liability the purchaser of land which a prior owner has charged with the payment of a sum of money either to himself or to some third person. S being indebted to his wife on account of her dower by a registered instrument covenanted to pay her a fixed monthly sum out of the income of certain land, and also not to alienate the same without providing for the allowance. He then mortgaged the land with possession to L, who subsequently sub-mortgaged it to the defendant. In a suit by the wife to enforce her claim for arrears, the opinion was expressed in the Allahabad Court that there was a valid charge on the land in the hands of the defendant whether or not he had taken with notice.² In a later case³ the same Court having to deal with similar facts left it an open question whether the charge could be enforced against the defendant in the absence of notice brought home to him. In both these cases the plaintiff was endeavouring to enforce against the purchaser an obligation arising out of a contract, and therefore it would seem that the section would have been applicable.⁴

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Commentary.

This section is an application of the general principle of estoppel declared in section 115 of the Evidence Act. When the beneficial owner of property has to all appearances clothed a third party with full authority to dispose of it, he is estopped from asserting his title against a person to whom such third party has disposed of it and who received it in good faith for value.⁵

1 Specific Relief Act, sections 24 (d) and 25 (c), see *Adams v. Broke*, 1 Y. & C. C. C., 627; as to notice see note 3 to section 3.

2 *Abadi v. Asa Ram*, I. L. R., 2 All., 162.

3 *Churaman v. Balli*, I. L. R., 9 All., 591.

4 See as to charges, note to section 100.

5 *Colonial Bank v. Cady*, 15 App. Cas., p. 285.

According to English law, the purchaser for value without notice who obtains the legal estate has an unanswerable defence, whatever may have been the breach of duty on the part of the vendor.¹ He may hold it, for instance, against the *cestui que trust* who has been defrauded by the conveyance of a trustee.² Here, though there is no question of legal estate, the principle applied in the section is the same, and it has been acted upon previously.

"It is a principle of natural equity that where one man allows another to hold 'himself out as the owner of an estate, and a third person purchases it for value from the apparent owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice of the real title, or there existed circumstances which ought to have put him upon an inquiry that if prosecuted would have led to a discovery of it.'"³

The person dealing with the property must be the ostensible owner. In other words he must appear to have full powers of disposition, for if the circumstances under which he holds are equally consistent with some limited authority to deal with the property, there is no estoppel. Thus in the case of shares in a company which on the death of the registered owner his executor indorsed in blank and handed to a broker who deposited them in a bank as security for advances made to him, it was held that the executors were not estopped from asserting their title against the bank, because their indorsement was only effected in order to obtain the registration of the shares in their names, and did not amount to an unequivocal representation that the broker had authority to dispose of the shares.⁴ The mere fact of a *benami* transfer does not constitute such a misrepresentation as necessarily to bind all persons claiming under the person who creates the *benami*; but, if his conduct has otherwise amounted to a representation that the *benamidar* was real owner, and there was nothing to put a purchaser upon inquiry, both he and his heirs will be bound by an alienation made by the *benamidar*

1 *Pilcher v. Rawlins*, L. R., 7 Ch., 259; *Maniklal v. Manchershie*, I. L. R., 1 Bom., 269; *secus* if an equitable title only is obtained, see note to section 137.

2 See also the Indian Trusts Act II of 1882, section 54.

3 *Ramcoomar Koondoo v. McQueen*, 11 Beng. L. R., p. 53, followed in *Doorga Narain v. Baney Madhub*, I. L. R., 7 Cal., 199; *Mohamed Mozuffer v. Kishori*, I. L. R., 22 Cal., 909; s.c., L. R., 22 I. A., 129; see also *Varden Seth Sam v. Luckpathy*, 9 Moo. I. A., 308; *Nanjundappa v. Hemappa*, I. L. R., 9 Bom., 16; *Karamat v. Sami-ud-din*, I. L. R., 8 All., 409; *Brojonath Ghose v. Koylash Chunder Banerjee*, 9 W. R., 593.

4 *Colonial Bank v. Cady*, 15 App. Cas., 267.

to a *bond fide* purchaser.¹ Similarly, a decree against the *benamidar* makes the matter *res judicata* against the real owner.²

Where, subsequently to the purchase of the equity of redemption by the plaintiff, the mortgagee having no notice thereof made further advances to the mortgagor on the security of the property, it was considered that, if the plaintiff was aware at the time of the advances being so made and notwithstanding his purchase allowed the property to stand in the vendor's name in the Collector's register, he might be bound to pay off the further advances as well as the original mortgage amount.³ In another case the adoptive mothers of one Ramchandra had mortgaged his property to the plaintiffs, not professing to do so in his behalf. It was contended that although the mothers had no right to deal with the property, the mortgage had become effectual through the subsequent conduct of Ramchandra in promising them that he would redeem the property. This promise was held to be of no effect as it was made without consideration and not addressed to the plaintiffs, and, as the mortgage had not been avowedly made for Ramchandra, his promise could not avail as a ratification of it.⁴

Mere quiescence on the part of the real owner, while other persons are dealing with the property, does not prevent him from asserting his rights.⁵ It is plain that persons having subordinate interests in land, e.g., under a mortgage or as tenants, are not bound to declare themselves, but that, on the contrary, the purchaser of such land is bound to make inquiries. The mere fact that they were silent raises no estoppel against them.⁶ In addition to the cases provided for in this section in which a person other than the owner may without his authority dispose of property, is the class of cases in which by reason of negligence which is the proximate cause of the transfer, the owner is estopped from disputing its validity.⁷

1 *Luchman Chunder v. Kally Churn*, 19 W. R., 292; *Chunder Coomar v. Hurbans*, I. L. R., 16 Cal., 137; *Sarat Chunder v. Gopal*, *ib.*, 148.

2 *Gopinath v. Bhugwat*, I. L. R., 10 Cal., 697; *Shangara v. Krishnan*, I. L. R., 15 Mad., 267; *Nandkishore v. Ahmad*, I. L. R., 18 All., 69.

3 *Govindrav v. Ravji*, I. L. R., 12 Bom., 33.

4 *Shiddeshvar v. Ram Chandrarav*, I. L. R., 6 Bom., 463.

5 *Baswantapa v. Ranu*, I. L. R., 9 Bom., 86.

6 *Bisheshar v. Muirhead*, I. L. R., 14 All., 362; *Chintaman v. Dardappa*, I. L. R., 14 Bom., 506.

7 See *Cooper v. Vesey*, 20 Ch. D., 611; *Mayor, &c., of the Staple of England v. Bank of England*, 21 Q. B. D., 160; as to omission to keep title-deeds see note to section 78 on estoppel.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Commentary.

This, like part of section 53, is taken from the statute 27 Eliz., c. 4. By section 5 of that statute it is enacted that:—

“That if any person or persons have heretofore sithence the beginning of the Queen's Majesty's reign that now is, made or hereafter shall make any conveyance, gift, grant, demise, charge, limitation of use or uses or assurance of, in or out of any lands, tenements or hereditaments with any clause, provision, article or condition of revocation, determination or alteration, at his or their will or pleasure, of such conveyance, assurance, grants, limitations of uses or estates of, in or out of the said lands, tenements or hereditaments, or of, in or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture of such assurance, conveyance, grant or gift; (2) and after such conveyance, grant, gift, demise, charge, limitation of uses or assurance so made or had, shall or do bargain, sell, demise, grant, convey or charge, the same lands, tenements or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the said first conveyance, assurance, gift, grant, demise, charge or limitation, not by him or them revoked, made void or altered, according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift or grant), (3) that then the said former conveyance, assurance, gift, demise and grant, as touching the said lands, tenements and hereditaments, so after bargained, sold, conveyed, demised or charged, against the said bargainees, vendees, lessees, grantees and every of them, their heirs, successors, executors, administrators and assigns, and against all and every person and persons which have, shall or may lawfully claim any thing, by, from or under them or any of them, shall be deemed, taken and adjudged to be void, frustrate and of none effect, by virtue and force of this present Act.”¹

¹ See Twyne's Case, 1 Smith's L. C., 8th ed., p. 1, and notes thereto. Compare New York Code, section 346.

A power reserved in a settlement to lease or mortgage, in such a way as in substance to defeat the estate conveyed, is a power of revocation within the meaning of the statute; but not so, a power to be exercised with the consent of third persons unless they be under the control of the settlor. It is immaterial whether the first conveyance is voluntary or for valuable consideration.¹ The proviso "subject to any condition attached to the exercise of the power," refers to a case where, for instance, it is provided that on the power of revocation being exercised the proceeds of the sale or other property of equal value shall be handed to the trustees of the settlement and not to the settlor. On such a condition being performed, and not otherwise, the second conveyance would avoid the settlement. In England it has been held that a power to revoke, on payment of a sum which is substantial in relation to the property conveyed, is not a power of revocation within the statute, and that the settlement in which it is reserved will therefore hold good against a second conveyance.²

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration.

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Commentary.

When a person enters into a contract without the power of performing it and subsequently acquires such power, he is bound to

¹ May's Voluntary Alienations, p. 194

² *Ibid*, p. 197.

perform the contract.¹ So by the Specific Relief Act, section 18, it is enacted that "if the vendor (having at the time of the contract only an imperfect title to the property) has subsequently to the sale or lease acquired any 'interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest.'" It seems doubtful whether previously to this enactment the principle was applicable to Hindu conveyances.² According to the English authorities

this title by estoppel, as it is called, only arises when
English law distinguished. * there has been a precise, clear and unambiguous

statement that the proposed transferor has the legal estate; but when a title by estoppel arises, it is absolute and avails against purchasers from the person estopped and his heirs, as well as against that individual.³ Furthermore, the person entitled by estoppel may sue on the covenants running with the land; whether the defendants in such action brought by a *bonâ fide* purchaser for value can plead that the conveyance containing the covenants was obtained from them by fraud is an open question.⁴ The section does not carry the doctrine of estoppel to that length; and while a mere representation by the supposed vendor that he has authority to sell is sufficient, the purchaser cannot pursue his claim to the property against any person other than the supposed vendor himself, his heirs, or persons taking from him with notice of the claim or as volunteers. The vendor cannot rely on the estoppel to entitle him to obtain specific performance. Where trustees having a power of sale at the request of the beneficiaries could not show that they had obtained their consent before filing the bill, the suit was dismissed.⁵ The present section refers to immoveable property only; whereas section 18 of the Specific Relief Act refers to contracts to sell or let property generally but does not include mortgages.⁶ The section is applicable to the case where a member of an undivided family under the Mitakshara sells a piece of the family property and afterwards by the death of another member of the family becomes entitled to a larger

1 *Pranjivan v. Bajju*, I. L. R., 4 Bom., 34; *Sheo Prasad v. Udai Singh*, I. L. R., 2 All., 719; and see Sugden's *Vendors and Purchasers*, 14th ed., p. 355.

2 *Dool Chund v. Brojo Bhokun*, cited in *Ram Niranjun v. Prayag*, I. L. R., 8 Cal., p. 144; *Deolie v. Nirban*, I. L. R., 5 Cal., p. 255.

3 *Heath v. Crealock*, L. R., 10 Ch., p. 30; *General Finance, & Co. v. Liberator Building Society*, 10 Ch. D., 15.

4 *Onward Building Society v. Smithson*, [1893] 1 Ch., 1; see further as to fraud *David v. Sabin*, *ib.*, p. 523.

5 *Adams v. Broke*, 1 Y. & C. C. C., 627; Sugden's *Vendors and Purchasers*, 211; Specific Relief Act, section 25 (a).

6 See however *Deolie v. Nirban*, I. L. R., 5 Cal., 253.

share of the property;¹ or again to the case where a coparcener sells a specific piece of land and afterwards on partition has that same piece of land allotted to him as part of his share.²

It has been held independently of the Act that the rule contained in the section does not apply to a case where the sale is made through the Court at the instance of an execution-creditor and is therefore compulsory.³

By the concluding words of the section it must be meant that the right recognised therein may subsist as long as the relation of transferor and transferee continues. For instance, if the transfer be by way of mortgage, the mortgagee's right to treat as part of the security property comprised in the mortgage, but only acquired by the mortgagor after the date of it, will avail him so long as the mortgage remains unsatisfied. On the relation of mortgagor and mortgagee being determined, whether by act of parties or operation of law, the right which arises out of that relation will also cease to exist.

- [1] **44.** Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

- [2] Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Commentary.

Note 1. Co-owners of land in English law are either joint-tenants or coparceners, in both of which cases they hold it by the same title, or

1 *Virayya v. Hannmanta*, 1. L. R., 14 Mad., 459.

2 See *Ajjudin v. Sheikh Budan*, 1. L. R., 18 Mad., 492.

3 *Alukmonee Dabee v. Bance Madhub*, 1. L. R., 4 Cal., 677.

tenants-in-common, in which case they hold it by different titles.¹ An alienation of his share by a joint-tenant or a coparcener effects a severance of the tenure for the alienee, who thus becomes a tenant-in-common with the other co-owner; and this seems to be the position assigned to the transferee under this section. By such alienation the purchaser takes, not a specific portion of the property, but an undivided share and while he himself becomes entitled to partition, he also takes subject to the right of the other sharers to enforce a partition.² If with the consent of the mortgagee of one share a partition of the whole property has been fairly and conclusively made, the mortgagee must enforce his charge against the lands allotted to his mortgagor and not against those of the other sharers.³

Note 2. In Bengal it has been held that a purchaser at a Court-sale of the rights of one member of a Hindu family is entitled to be put in physical possession even of a part of the family-house,⁴ and presumably it would have been the same with a private sale. The result of the section is that the purchaser of a share in a family-house will only be entitled to sue for partition, and the inconvenience of bringing persons who may be alien in religion, caste or race into the house, is avoided.⁵

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the

¹ As to which see Blackstone's Comm., Vol. ii, pp. 187, *et seq.*; Sugden's Vendors and Purchasers, 14th ed., p. 697; Dart's Vendors and Purchasers, 6th ed., p. 1047.

² *Suhramanya v. Padmanabha*, I. L. R., 19 Mad., 267. See as to rights of such purchaser, *Pandurang v. Bhasker*, 11 Bom., H. C., 72; *Venkatarama v. Meera Labai*, I. L. R., 13 Mad., 275; *Krishnasami v. Rajagopala*, I. L. R., 18 Mad., 73.

³ *Byjnath v. Ramoodeen*, L. R., 1 L. A., 106; s.c., 21 W. R., 223; *Sharat v. Hargobindo*, I. L. R., 4 Cal., 510; as to alienation by members of a Hindu family, see Mayne's Hindu Law, § 330, *et seq.*

⁴ Mayne's Hindu Law, § 329.

⁵ See *per Westropp, C.J.*, in *Bajji Anant v. Ganesh*, I. L. R., 5 Bom., p. 504, see note 4 to section 6, *ante* p. 32.

absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Commentary.

When several persons jointly make a purchase of land, they will, in the absence of any stipulation to the contrary, be interested in it in proportion to their shares in the purchase-money. Until the contrary is shown, they are presumed to have contributed equally.

This section, it will be observed, deals with the *quantum* and not with the quality of the interest of joint-purchasers. The question whether they become joint-tenants or tenants-in-common, is not touched. According to

Quære, whether joint-tenants or tenants-in-common.

English law, a conveyance to two persons contributing the money in equal shares and not purchasing as partners or for the purposes of trade or speculation,¹ in general, constitutes them joint-tenants, and there will consequently be a right of survivorship between them.² But if there are in the transaction any special circumstances showing that it was not intended that a right or benefit of survivorship should exist, or if one of the beneficiaries contributes more than the other, they are tenants-in-common, and there will be no survivorship.³ The leaning of the Courts of equity moreover is in favour of a tenancy-in-common, and where slight words of intention of severance are found, they are always acted on.⁴ With regard to cases governed by Hindu law the Privy Council has observed that "the principle of joint-tenancy appears to be unknown to Hindu law except in the case of coparcenary between the members of an undivided family."⁵

As between two co-owners of property the general rule is that neither is entitled to exclusive possession and neither is entitled without the other's consent to alter the condition of the property as, for

1 Bone v. Pollard, 24 Beav., p. 288.

2 Robinson v. Preston, 4 K. & J., 505.

3 Aveling v. Knipe, 19 Ves., p. 441.

4 Kenworthy v. Ward, 11 Hare, p. 204.

5 Jogeswar v. Ram Chund, L.R., 23, I.A., 44

instance, by lowering or raising a party-wall.¹ The remedy of the co-owner whose right is infringed is ordinarily by injunction.² Relief by way of injunction being, however, discretionary, it will not ordinarily be granted, when, for instance, one co-owner has erected a costly building on the joint property without the consent of the other,³ or where the injury to the land is such that the aggrieved sharer might obtain a complete remedy in a suit for partition.⁴ Again, when one of two persons holding certain land in common was in exclusive possession of part, cultivating it as if it were his own, and resisted the entry of the other who desired to carry on operations incompatible with the existing mode of cultivation, the Privy Council held that the latter was entitled to compensation only and not to an injunction, on its appearing that the course of cultivation and the use of the land adopted were not improper.⁵ The Judicial Committee added with reference to the other relief claimed by the plaintiff:—

“It seems to their Lordships that if there be two or more tenants-in-common and one, A, be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant-in-common, B, attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation on which A is engaged and the profitable use by him of the said part, and A resists or prevents such entry, not in denial of B's title but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession.”

In that case the claim for joint possession was based on the contention that the conduct of the defendant amounted to actual ouster, but the plaintiff was held not to have established a right to such a decree for the reasons already stated. When, on the other hand, one co-sharer appropriated the common land to himself proposing to exclude the other co-sharers from its use and enjoyment, the Full Bench of the Allahabad High Court held that an injunction had rightly issued directing certain *katcha* buildings erected by him to be pulled down and restraining him from building on the land as exclusive owner at any future time.⁶ As

1 *Kanakayya v. Narasimhulu*, I. L. R., 17 Mad., 88; *Najja Khan v. Nutiaz-ud-din*, I. L. R., 18 All., 115; *Muhammad v. Faiz Baksh*, *ib.*, 361.

2 *Rajendro v. Shama*, I. L. R., 5 Cal., 188; *Holloyay v. Wahid Ali*, 12 Beng. L. R., 191.

3 *Lala Biswambhar Lal v. Rajaram*, 3 Beng. L. R., App., 67; *Nocnry Lal Chuckerbutty v. Bindabun Chunder*, I. L. R., 8 Cal., 708.

4 *Paras Ram v. Sherjit*, I. L. R., 9 All., 661; *Shadi v. Anup Singh*, I. L. R., 12 All., 436.

5 *Watson & Co. v. Ramchand*, I. L. R., 18 Cal., 18; reversing *Ramchand v. Watson & Co.*, I. L. R., 15 Cal., 214.

6 *Shadi v. Anup Singh*, I. L. R., 12 All., 436.

to the rights of one joint-tenant in giving notice to quit or insisting on forfeiture against a lessee, see notes to sections 106 and 111.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations.

(a) A, owning a moiety, and B and C, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(b) A, being entitled to a life-interest in mauza Atrali, and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

Commentary.

As instances of the transaction contemplated by this section may be mentioned the case of a trustee for sale of an aliquot part, *e.g.*, an undivided fourth of an estate, concurring with the owners of the rest in the sale of the whole estate for an entire sum;¹ that of a tenant-for-life concurring with the remainder-man;² and the owner of a lease concurring with the reversioner³ for a similar purpose.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

Transfer by co-owners of share in common property.

¹ *Rede v. Oakes*, 32 Beav., 555; *Poulett v. Hood*, L. R., 5 Eq., 115.

² *Morris v. Debenham*, 2 Ch. D., 540.

³ *Clark v. Seymour*, 7 Sim., 67; *In re Cooper and Allen's Contract*, 4 Ch. D., 802.

Illustration.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in manza Sultanpur, transfer a two-anna share in the mauza D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Commentary.

This is a statement of the rule generally expressed in the maxim "*Qui prior est tempore, potior est jure.*" For instance, of two usufructuary mortgages of the same property the later in date must give way to the earlier;¹ or, when mortgages have to be enforced by sale, the first incumbrancer is entitled to be satisfied out of the property if necessary to the exclusion of the second. But he may lose his priority by fraud or other conduct on his part rendering the provisions of section 78 applicable.² And so one who buys from a mortgagor may be entitled to relief if by fraud he has been kept in ignorance of the mortgage, though mere want of notice to the vendee would not affect the rights of the mortgagee.³ When a conflict arises between two registered instruments, it is the date of execution and not the date of registration that determines the question of precedence.⁴ There is no conflict between a mortgagee and a subsequent purchaser who takes under an express or implied agreement to pay off the mortgagee.⁵ Where on the one hand

¹ Karamat v. Sami-ud-din, I. L. R., 8 All., 409; Sirludh Rai v. Raghunath, I. L. R., 7 All., p. 572.

² See sections 78 and 79, and notes thereto, for the law relating to priorities among incumbrancers.

³ Durga Prasad v. Shambu Nath, I. L. R., 8 All., 58; Cooling v. Saravanna, I. L. R., 12 Mad., 69; as to unregistered mortgages see note to section 54 and Maganlal v. Shakra, I. L. R., 22 Bom., 945.

⁴ See section 47 of Registration Act; Santaya v. Narayan, I. L. R., 8 Bom., 182. For the subjects of notice, *lis pendens*, and registration as affecting priorities see sections 52 and 54 (note 2), respectively.

⁵ Bamachandra v. Krishna, I. L. R., 9 Mad., 495.

there is a transfer legally completed, and on the other hand there is something short of a transfer, for instance, a contract only, not creating any interest in the property,¹ (section 54), or a conveyance defective for want of the necessary registration² no conflict arises, and

therefore the section does not apply. As between persons who become interested in the equity of redemption of immoveable property, the section regulates their priorities. Subject to the provisions of sections 78 and 79 successive mortgagees rank in their order of date, and the doctrine of notice which holds good where assignments of debts or of interests in moveable property are in question (section 131) is not recognized. The rule in England is the same. In *Wilmot v. Pike*³ the fourth mortgagee of land claimed priority over the third mortgagee on the ground that, while he had given notice of his mortgage to the first mortgagee in whom the legal estate was vested, the third mortgagee had not done so. It was held that the doctrine of notice applicable to equitable interests in personal property did not extend to conveyances of equitable interests in land, and that such conveyance was complete without notice to the holder of the legal estate and must take effect in order of date. In a similar case⁴ where the question arose between the second mortgagee and later incumbrancers who, taking without notice of the second mortgage, had given notice of their charge to the first mortgagee, it was held that the omission to give notice which he was not bound to give did not prejudice the right of the second mortgagee. It would be different if it were shewn that notice was withheld in order to enable the mortgagors to raise more money on the security of the equity of redemption. "No mere absence of activity on the part of an equitable incumbrancer postpones his incumbrance. Nothing short of an absence of activity, amounting either to participating in a fraud or to such a course of dealing as the Court conceives must inferentially affect the party with the commission of fraud, could have this effect." Acting on the same principle, the High Court of Bombay held that the mortgagee of land who had made further advances on the same security could not hold the land against a purchaser of the equity of redemption who had bought before those further advances were made. It was immaterial that he had not received notice of the purchase. But if the purchaser had allowed the mortgagee to make advances under the supposition that the original

¹ See note 2 to section 40

² See note 3 to section 54.

³ 5 Harc, 14; see *in re Richards*, 45 Ch. D., 589.

⁴ *Rooper v. Harrison*, 2 K. & J., 86, 104.

mortgagor still remained owner of the equity of redemption, such conduct would give the mortgagee a better equity.¹ Mr. Lewin observes with regard to the rule that the doctrine of notice does not apply to real estate, that it

"renders any dealings with equitable interests therein needlessly dangerous. Thus A is entitled to an equitable interest of which the legal estate is in B upon trusts requiring B to retain possession of the title-deeds and not to part with the legal estate. A conveys his interest to C who makes no inquiries about incumbrances and gives no notice to the trustee: A afterwards fraudulently concealing the previous assurance conveys the same interest to D who makes inquiries of the trustee respecting incumbrances and gives him notice of his own charge. There seems no sound reason for postponing D who has taken these precautions to C who has merely priority in point of time. It is however now settled that the incumbrances in such a case rank *prima facie* and in the absence of other controlling equities, in order of date."²

Those observations apply with less force in this country because the system of registration operates to some extent to give notice of prior incumbrances.³

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the

Transferee's right
under policy.

transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Commentary.

This section would appear to have been framed in deference to the opinion of James, L.J., as expressed in a recent case.⁴ There the purchaser of a house which was destroyed by fire after the contract, but before the conveyance, sued the vendor to recover a sum received by him on a policy of fire-insurance. The majority of the Court held that the purchaser, under such circumstances and in the absence of any special contract between him and the vendor, was not entitled to the

¹ Govindraj v. Ravji, I. L. R., 12 Bom., 33; see note to section 78.

² Lewin on Trusts, p 581.

³ See ante p. 19.

⁴ Rayner v. Preston, 18 Ch. D., 1, following North of England Oil Cake Co. v. Archangel Maritime Insurance Co., L. R., 10 Q. B., 249.

benefit of the insurance, on the ground that the contract between the vendor and the insurers was purely collateral. "On the sale of a thing insured," it was said, "no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly." James, L.J., however thought that a policy of insurance on a house should be considered to be for the benefit of all persons concerned, and that from the date of the contract the vendor was in the position of a trustee receiving the money "as money which ought to be laid out in reinstating the premises; or, in other words, as money which the purchaser alone had any real or substantial interest in." Mr. Dart urges in support of the purchaser's claim under such circumstances the injustice of allowing the vendor to take his purchase-money, if he can get it, "twice over—once from the insurance office and again from the purchaser."¹ In a later case on similar facts, in which however the insurer sued the vendor to recover the insurance-money, it was held that inasmuch as the contract of fire-insurance was a contract of indemnity against actual loss, the vendor could not after receipt of the purchase-money retain the insurance-money, and that the insurer was entitled to recover it.² This decision disposes of Mr. Dart's argument.

Several difficulties may arise in the application of this section.

Where policy is not assigned.

Suppose the vendor having received the purchase-money afterwards receives the insurance-money: who has the first claim upon it,—the insurer on the principle acted on in the case last cited, or the purchaser in virtue of this section? Or, if it has been paid back to the insurer, can the purchaser recover it? Or, if it has been paid over to the purchaser, can the insurer recover it? Suppose again that the vendor having received the purchase-money does not demand the insurance-money, can the purchaser compel him to do so, or sue the insurer in the vendor's name or otherwise? In the view taken by James, L.J., it may be possible to give consistent answers to these questions. The insurance-money, once in the hands of the vendor is regarded in equity as the property of the purchaser, and therefore, as the vendor is bound to deliver it to him, so he is also by his obligation as trustee bound not to pay it back to the insurer, unless there is any surplus not required for the reinstatement of the property. On the other hand, if the insurance-money remains unpaid, it would seem to follow that the vendor is no less a trustee of the policy for the purchaser, and therefore that the insurer, if sued by

¹ Dart's Vendors and Purchasers, 5th ed., p. 812, but see now 6th ed., p. 913.

² *Castellain v. Preston*, 11 Q. B. D., 380.

the latter, would have no defence. But it must be observed that there is nothing in the language of the section to suggest the theory of trusts, and that provision is made for the destination of the insurance-money only in the event of its being received by the transferor. Whether the right conferred on the transferee is to override the claim of the insurer made good in the case of *Castellain v. Preston*,¹ cited above, may be doubtful, though it might be suggested that the transferor would at any rate have a good defence, if he pleaded that he had paid the money over to the transferee. In the other event where the insurance-money has never been paid, there is nothing in the language of the section to justify the conclusion that the rights of the parties have been altered.

As to the rights of the parties where there has been an assignment of the policy there can be no doubt. In *Garden v. Ingram*² the holder of a lease, containing a covenant that the premises should be insured in the names of the lessor and lessee and that the monies so secured should be applied in restoring the premises, mortgaged his interest to the plaintiff by an instrument which though referring to the lease did not mention the insurance; the premises having been destroyed by fire, the plaintiff restored them without waiting to get the money due on the policy, and on a claim filed by him the mortgagor was decreed to deliver up the policy and join with the lessor in signing the receipt to enable the mortgagee to receive the money due under the policy. It was because the lease contained a provision that the money on the policy should be laid out in reinstating the premises, that the interest in the policy was held to have passed to the mortgagee. In the absence of a provision that the money shall be applied to restoring the premises, the mortgagee would have no such right.³ As to the rights and duties of mortgagees in reference to insurance, see sections 72 and 76 (f).

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent bond *fide* paid to holder under defective title.

¹ 11 Q. B. D., 380.

² 23 L. J., Ch., 478.

³ *Lees v. Whiteley*, L. R., 2 Eq., 142.

Illustration.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Commentary.

This section is taken almost word for word from Act XI of 1855—an Act inapplicable to any case to which the English law was not applicable, and of which the preamble and the first section are affected by the schedule to the present Act. If the section was not intended to go beyond the illustration, it would be simply an application of the general principle that, if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom it was made, he is discharged from his obligation.¹ In section 131 may be seen a further expression of the same principle. In a case where notice of the plaintiff's claim was given before the rent fell due, it was held that a previous payment of rent afforded the tenant no defence. A tenant who pays rent before it is due cannot be said to do so in fulfilment of his obligation, but rather to make an advance to his landlord on the understanding that on the day when the rent becomes due, such advance shall be treated as a fulfilment of the obligation to pay rent,² nor would a tenant in such a case be protected under this section.

The section is however so worded that it would seem to apply equally to cases where there has been no transfer. It would seem to be a good defence to a suit for mesne profits or rent, brought by the real owner of land against a person in possession, for him to aver that he had in good faith, that is, without notice of any adverse claim, paid over the rent or profits to one of whom he in good faith held the property, though the latter had in reality no right to it. If this is so, the result would be that while the *bonâ fide* possessor would escape liability, where he held subordinately to another and had delivered over the profits to him, he would in other cases remain under the liability to account to the true owner which the English common law recognizes. In the case supposed the real owner would have his remedy only against the person to whom the rents and profits had been delivered. In a recent English case the question arose whether a tenant let in by a person who had previously mortgaged the land could in answer to the latter's claim for rent plead a payment of rent made to the mortgagee under threat of eviction. It was held that such payment afforded the tenant a good defence,

¹ See section 109, proviso, and note to section 131.

² De Nicholls v. Saunders, L. R., 5 C. P., 589; Cook v. Guerra, L. R., 7 C. P., 132, and see Moss v. Gallimore, 1 Smith's L. C., 8th ed., p. 627, and notes thereto.

inasmuch as it was exacted in consequence of the mortgagor's default and was made under compulsion of law.¹ In similar cases in this country when the mortgage is of such a nature that the mortgagee is in a position to evict a tenant let in by the mortgagor, the question must be decided in the same way.

51. When the transferee of immoveable property [1] makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

Improvements made by bona fide holders under defective titles.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee [2] has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Commentary.

Note 1. This section, excepting the last clause, is, like section 50, taken from Act XI of 1855. In order to entitle a person to compensation for improvements he must according to this section show that when making them he believed in good faith that he was absolutely entitled to the land. It is not necessary that he should show that he was careful to investigate the title. Carelessness is not inconsistent with good faith. Still he must prove that he entertained the belief, and if the circumstances were such as to excite suspicion, then the omission to inquire may be

¹ Underhay v. Read, 20 Q. B. D., 209.

evidence to prove want of good faith.¹ The section is not limited to transferees for value. It is not necessary under this section to show that the real owner knew that the land belonged to him and was aware of the mistake under which the occupant was labouring. Nor is it necessary to prove that the latter was encouraged by the real owner to expend money in the land.² The cases in which on proof of such facts it has been held that an estoppel or equity arises in favour of the occupant, and in restraint of the owner's unconditional power of ejectment, stand outside the purview of this section. Nor again does the section touch the cases in which the person claiming on account of improvements effected by him has entered upon the land as a tenant, for he cannot then have been acting on the belief that he was absolutely entitled. For the case of tenants who have attached things to the earth section 108 (h) provides that they may remove them during the continuance of the lease, and previously to the passing of this Act a similar right of removal was recognized generally in favour of all occupants, not being mere trespassers, under a *bonâ fide* claim of title.³

It is to be observed that under this section the right is extended to all transferees without qualification. A person however who is merely under a contract to purchase is, it should be remembered, not a transferee. And the improvements intended by the section must, it is apprehended, be permanent improvements.

As to improvements and the removal of them by mortgagees, see section 63.

Note 2. In this case, as in that of a tenant-at-will, whose tenancy has been determined, the law gives effect to the reasonable expectation which the person sowing the crop has of reaping the fruits. He is not protected from eviction, but is entitled to free ingress and egress to take the crop.* In the absence of such expectation, that is, where there is knowledge of the imperfection of the title, the right does not exist.⁵

Emblements.

1 *Jones v. Gordon*, 2 App. Cas., 629; see as to good faith and absence of notice *Maniklal v. Dinsha Coachman*, I. L. R., 1 Bom., 269.

2 *Ramsden v. Dyson*, L. R., 1 H. L., 129, explained in *Plimmer v. Mayor of Wellington*, 9 App. Cas., 699; *Nannihal v. Rameshar*, I. L. R., 16 All., 329; *Arunachelum v. Olagappah*, 4 Mad. H. C., 312.

3 *In re Thakoor Chunder Paramanick*, Ben. L. R., Sup. Vol., 595; *Mudhoo Soodun v. Juddooputty*, 9 W. R., 118; *Parbutty Bewah v. Woomatara Dabee*, 14 Beng. L. R., 201; *Narayan bin Raghaji v. Bholagir*, 6 Bom. H. C., A. C., 80.

4 *Deo Pat v. Ram Antar*, I. L. R., 8 All., 502.

5 *Land Mortgage Bank v. Vishnu*, I. L. R., 2 Bom., 670; see as to right of tenants, section 108 (i) and as to mortgagees, *Ramalinga v. Samiappa*, I. L. R., 13 Mad., 15, and note (5) to section 58.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property pending suit relating thereto.

Commentary.

The principle on which the doctrine of "*lis pendens*" rests is that no alienation by either party to a pending litigation is to be allowed to prejudice the interests of the parties thereto. The purchaser of immoveable property, from one party to a pending suit, is not permitted to question the decree that is eventually made, or put the other party to proof of his claim again.¹ And it is immaterial whether the purchaser has actual notice of the litigation or not.

A suit is said to be pending at any time between the presentation of the plaint and the making of the final decree. It becomes contentious only on the service of summons upon the defendant.² On the other hand it ceases to be contentious when a decree is made by consent.³ The presentation of an award to be filed in Court under the provisions of the Civil Procedure Code has been held to be equivalent to the presentation of a plaint so as to constitute a *lis pendens*.⁴ The original decree passed in a suit is not necessarily a final decree, for there may be an appeal and the proceedings on appeal are a mere continuation of the suit.⁵ A decree

1 The doctrine of *lis pendens* does not apply to moveables. *Wigram v. Buckley*, [1894] 3 Ch., 483.

2 *Radhasyam v. Pibu*, I. L. R., 15 Cal., 647; *Abboy v. Annamalai*, I. L. R., 21 Mad., 180.

3 *Vythlnadayyan v. Subramanya*, I. L. R., 12 Mad., 439; *Kishory v. Mahamed Mjaffar*, I. L. R., 188, 195.

4 *Pranjivan v. Bajji*, I. L. R., 4 Bom., 34.

5 *Gobind Chunder v. Guru Churn*, I. L. R., 15 Cal., 94; *Sadasiva v. Muttu Saba-pathi*, I. L. R., 5 Mad., 106.

for an account does not put an end to the suit,¹ and a suit instituted to carry out the trusts of a will is still pending after a decree that a scheme should be settled, has been passed, and before a final order has been made.² Even after decree, the doctrine may still be applied to the case of a sale to a third person effected during the proceedings in execution of the decree and before sale thereunder. The purchaser at the sale in execution of the decree takes the property free from any claim by the prior purchaser.³

The doctrine of *lis pendens* was thus explained by Turner, L.J., in the leading case of *Bellamy v. Sabine*⁴ :—

"It is a doctrine common to the Courts both of law and equity, and rests, I apprehend, upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were allowed to prevail. The plaintiff would be liable to be defeated in every case by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding."

In other words, parties bound by a litigation cannot alter the object of it so as to withdraw it from the operation of the decree which may be made in the suit, for otherwise litigation might be interminable. The alienation taking from a party pending litigation, is therefore as much bound by the decree as if he had himself been a party to the suit.⁵

The doctrine of *lis pendens*, as enunciated in English cases irrespectively of the statute 2 & 3 Vic., c. 11, has been acted upon in numerous cases in India,⁶ and was recognised in the Code of Civil Procedure of 1859.⁷ In *Gulabchand v. Dhondi*⁸ the defendant was suing on his mortgage of certain property, when a second mortgage of it was made to

1 *Kinsman v. Kinsman*, 1 Russ. & M., 617; *Higgins v. Shaw*, 2 Dr. & War., 356; see notes to *Le Neve and Le Neve*, 2 W. & T. L. O., 6th ed., 26; *Price v. Price*, 35 Ch. D., 297.

2 *Gocool Chunder v. Administrator-General of Bengal*, 1 L. R., 5 Cal., 726.

3 *Shivjiram v. Waman*, 1 L. R., 22 Bom., 939, explaining *Venkatesh v. Maruti*, 1 L. R., 12 Bom., 217 and *Kanu Khandu v. Krishna*, 5 Bom. H. C., (A. C.), 147; *Thakur Prasad v. Gaya Sahn*, 1 L. R., 20 All., 319.

4 1 Do G. & J., 566.

5 *Traquebar Sumi v. Annai*, 6 Mad. H. C., 238; *Motilal v. Karrabuldin*, 1 L. R., 25 Cal., 179.

6 *Manual Fruval v. Sanagapalli*, 6 Mad. H. C., 104; *Sam v. Appundi*, 6 Mad. H. C., 75; *Balaji v. Khushalji*, 11 Bom. H. C., 21; *Gulabchand v. Dhondi*, *ib.*, 64; *Krishnappa v. Bahiru*, 8 Bom. H. C. (A. C.), 55; *Lakshuandas v. Dasrat*, 1 L. R., 6 Bom., 168; *Parvati v. Kisan Sing*, 1 L. R., 6 Bom., 567; *Ramachandra v. Mahadaji*, 1 L. R., 9 Bom., 141; *Sadasiva v. Mutta Sabapathi*, 1 L. R., 5 Mad., 106; *Gajapati v. Gajapati*, 1 L. R., 7 Mad., 96; *Brahmanayaki v. Krishna*, 1 L. R., 9 Mad., 92.

7 Section 223.

8 11 Bom. H. C., 64.

the plaintiff. It was held that the plaintiff, being a purchaser *pendente lite*, could not maintain a suit against the defendant, who had himself become purchaser under his mortgage-decree. In *Lala v. Buli* the defendant bought at an execution-sale, on the 7th of December 1874, the property of one Collis, in respect of which a mortgage suit was then pending. The same property was on the 23rd of February 1875 sold in execution of the mortgage-decree, and afterwards passed to the plaintiff. It was held that the defendant as an alienee *pendente lite*, was not entitled to possession as against the plaintiff.

In such suits as the above, there is no doubt that the right to the property is directly and specifically in question. The doctrine has not been applied except in cases where the pending suit was one in which a specific claim was made affecting the particular subject-matter. Thus a suit to carry into effect the general trusts of a creditor deed, or a mere general administration-suit, or a suit for money secured on an estate but not directed against the estate itself, would not be a *lis pendens* within the meaning of the rule. But it is otherwise when the suit is brought by a creditor to administer the testator's estate charged by his will with his debts. Such a suit is deemed to be a *lis pendens* which, when registered under the English law, gives the plaintiff priority over a purchaser from a defendant holding the estate under the will, whether as devisee or executor; subject however to an exception in favour of a purchaser who reasonably supposes that the defendant is selling for the purpose of discharging the testator's debts, for the pendency of a creditor's suit does not suspend the executor's right to dispose of the property and give a good title for this purpose.² Unless the suit is such in respect of its nature and of the relief prayed for, as to give notice to strangers that the particular property may be affected by the decree or order, they are not bound by it. So where the suit in question was brought by the representative of a deceased member of a Hindu family against the manager, asking that accounts might be taken of the management of the joint estate, and that a partition might be effected between the parties; and by the decree accounts were directed and a receiver appointed, and by a subsequent order it was directed that part of the estate should be sold, it was held that the plaintiff claiming under a mortgage made pending these proceedings but before the last mentioned

1 I. L. R., 4 Cal., 789; as to involuntary sales see below, and *Rajkishen v. Radha Madhub*, 21 W. R., 359; *Jahroo v. Raj Chunder*, I. L. R., 12 Cal., 299; *Radhamadhub v. Manohur*, I. R., 15 I. A., 97.

2 *Price v. Price*, 35 Ch. D., 297; see cases cited in *Robbin's Law of Mortgages*, p. 1323.

order was made, was not affected by the order for sale, and was therefore entitled in priority to the purchaser thereunder.¹ The Court in giving judgment, adopted the language of Couch, C.J., in a similar case, where he observed :—

“With regard to the question of *lis pendens* the doctrine appears to be this: that the alienor is bound by the proceedings in the suit after the alienation and before he becomes a party. Then the question is by what proceedings is he bound? Is he bound by the proceedings which arose from the nature of the suit and from the case set up and the relief prayed in the bill, or is he bound by any order which the Court may be induced to make, in the course of the suit? I can find no authority which goes to the extent of saying that because he does not think fit to become a party to the suit, he is to be bound by any order whatever that may be made. It seems to me that he ought only to be bound by proceedings which, from the nature of the suit and the relief prayed, he might expect would take place; and if there had been no notice in this case it might have been necessary to determine what is the precise effect of *lis pendens*. But this need not now be determined. Practically there is no substantial difference between *lis pendens* and having notice of the suit.”²

On the other hand, where the suit was brought by widows of a deceased Muhammadan, claiming that dower should be paid out of certain property, it was held that a mortgagee of the same property taking from the heir *pendente lite* was bound by the decree, and therefore had no right as against the widows who had purchased in execution of the decree in their own suit.³ It might be difficult to distinguish from this case that of a decree made in a suit for maintenance, charging the amount payable on a house mentioned along with other property in the plaint. It was held however that, as the plaint did not ask for a charge on this house specifically, the plaintiff who had during the litigation taken a mortgage of it was not affected by the decree.⁴ A suit by the purchaser of property, subsequently sold in execution of a decree on a mortgage comprising it and other property, to enforce his right of contribution against that property clearly comes within the operation of the section.⁵

In some cases the Courts, relying on the distinction which may be drawn between voluntary sales and involuntary sales, *e.g.*, those made in execution of decrees,⁶ have expressed the opinion that the doctrine of *lis pendens* does not apply

1 *Kasimunnissa v. Nilratna*, I. L. R., 8 Cal., pp. 79, 85.

2 *Kailas v. Fulchand*, 8 Bong. I. R., 474; *Kishory v. Mahamed Mujaffar*, I. L. R., 18 Cal., 188, and see *Gajapati v. Gajapati*, I. L. R., 7 Mad., 96.

3 *Bazayet v. Dooli Chund*, I. L. R., 4 Cal., 402.

4 *Manika v. Ellappa*, I. L. R., 19 Mad., 271.

5 *Baldeo v. Buij Nath*, I. L. R., 13 All., 371.

6 See as to this distinction *Dhondronath v. Ramkumar*, I. L. R., 7 Cal., 107; *Lala v. Mylne*, I. L. R., 14 Cal., 401; *Richards v. Jenkins*, 18 Q. B. D., 401; *Kishory v. Mahamed Mujaffar*, I. L. R., 18 Cal., p. 198, and compare section 69, Trusts Act, and section 13, Easements Act.

where the sale is involuntary. This opinion was expressed, though it was unnecessary to decide the point, in a Bombay case where the contest was between the defendant, purchaser at a sale made in execution of one decree, and the plaintiff claiming to have the property resold in execution of his decree. At the time of the sale a suit was pending, in which the plaintiff was seeking as against two claimants, at whose instance his attachment had been removed, to have it declared that the property was liable to attachment and sale. It was held that the doctrine of *lis pendens* had no application, and that, notwithstanding the plaintiff's attachment, it was open to the holder of the decree under which the sale was made to have the property sold. The sale was valid and, if the plaintiff had any claim, it was against the proceeds in the hands of the decree-holder, under the provisions of sections 270 and 271 of Act VIII of 1859, which was in force at the date of the sale.¹ In that case it will be seen that the defendant's purchase was in no sense a purchase from one of the parties to the pending suit and that thus the point did not really arise for decision. In another case where, during the pendency of a suit brought for the payment of a mortgage debt and in default for foreclosure or sale, part of the mortgaged property was sold in execution of a decree against the representatives of the mortgagor, the question arose whether a purchaser at this sale was affected by the doctrine of *lis pendens*. The High Court of Bengal decided the question in the negative, observing that it does not follow that the rule (of *lis pendens*) "would hold good where the alienation is not by the mortgagor, but by the Court acting on behalf of creditors against the mortgagor and where the process of sale, or at any rate proceedings with a view to the sale of the property had commenced before the suit was instituted."² The Judicial Committee, while reversing the judgment on other grounds, expressed considerable doubt as to the correctness of this ruling.³ In a recent Bengal case,⁴ where the contest was between one who had obtained possession under a decree in ejectment against a third person and one who, pending the suit in ejectment, had purchased the interest of the defendant in execution of a money-decree against him, it was argued principally on the authority of *Anundo Moyee v. Dhonendro*⁵ that the doctrine of *lis pendens* was inapplicable; but the Court held

¹ *Lala Nulji v. Kashibai*, I. L. R., 10 Bom., 400; see too *Naffur Merdha v. Ram Lal*, 15 W. R., 308; *Ali Shah v. Husain*, I. L. R., 1 All., p. 590; section 295 of the Code of 1882 contains the present provision for the case of rival decree-holders.

² *Chundernath v. Nilakant*, I. L. R., 8 Cal., 690.

³ *Nilakant v. Suresh Chandra*, I. L. R., 12 Cal., pp. 418, 420, 421.

⁴ *Gobind Chunder v. Guru Churn*, I. L. R., 15 Cal., 94.

⁵ 14 Moo. I. A., 101; s.c., 8 Beng. L. R., 122.

otherwise and showed on an examination of the judgment of the Judicial Committee in that case that it was no authority for the position that a purchaser at an execution sale was not affected by the doctrine of *lis pendens*. And this is the view which seems to be generally accepted.¹

When attachment has been duly made in execution of a decree, any private alienation of the attached property during the continuance of the attachment is void against all claims enforceable thereunder.² And it has been said that any proceedings in execution, whether preceded or not by actual attachment, "taken for the purpose of effecting a sale are in a sense proceedings in the suit against property, and all persons who purchase from the judgment-debtor pending such proceedings come into the position of purchasers *pendente lite*."³

The doctrine of *lis pendens* operates only upon alienations made by one of the parties to a suit. An alienation by a stranger to the suit is not affected by it. Alienations, which are inconsistent with the rights that may be established by the decree, are affected by it,⁴ but not the rights of persons claiming paramount to the parties to the suit. The purchaser therefore at a sale under the Madras Rent Act⁵ would not be affected by the circumstance that he took pending a suit between the pattadar and his mortgagee.⁶

Questions of *lis pendens* cannot arise with reference to litigation in a Court other than those referred to in the section, or in a Court devoid of the requisite jurisdiction.⁷ In a case decided by the Privy Council where, pending a suit for foreclosure in the Supreme Court, lands in the mofussil were purchased from the defendant, it was held that the purchaser was not affected by the decree, apparently for the

1 *Manual Fruval v. Sanagapalli*, 7 Mad. H. C., 104; see *Lala v. Buli*, I. L. R., 4 Cal., 789; *Jharoo v. Raj Chunder*, I. L. R., 12 Cal., 299; *Parvati v. Kisan Sing*, I. L. R., 6 Bom., 567; *Shivjiram v. Waman*, I. L. R., 22 Bom., 939; *Kunhi Umar v. Amed*, I. L. R., 14 Mad., 491.

2 Section 276, Civil Procedure Code; section 240 of the Code of 1859, see *Annud Loll v. Jullothur*, 14 Moo. I. A., 543; s.c., 10 Beng. L. R., 134; *Puddomonee v. Roy Muthooranath*, 12 Beng. L. R., 411; *Ganga Din v. Kushali*, I. L. R., 7 All., 702.

3 *Bhuggobutty v. Shamachurn*, I. L. R., 1 Cal., p. 341; *Anand v. Panchilal*, 5 Beng. L. R., 703.

4 *Kailas v. Fulchand*, 8 Beng. L. R., 474; *Bhanoomutty v. Premchand*, 15 Beng. L. R., 28; *Anundo Moyce v. Dhonendro*, *supra*.

5 Act VIII of 1865 (Madras).

6 *Kondi Munisami v. Dakshinamurthi*, I. L. R., 5 Mad., 371; see *Lalu Mulji v. Kashibai*, I. L. R., 10 Bom., 400.

7 *Palani v. Subramanyam*, I. L. R., 17 Mad., 257; *Ali Shah v. Hussain*, I. L. R., 1 All., 588.

reason that the decree was inoperative over such lands.¹ In addition however it may be noted that the sale was made in pursuance of an attachment prior to the mortgage. An adoption *pendente lite* is not on the same footing as an alienation. The adopted son, like a son born during the pendency of a suit, must be made a party in order to be bound by the decree.² *Lis pendens* creates no incumbrance on the property and so affords no answer to a bill for specific performance.³ In case of an alienation pending the suit the purchaser may under section 372 of the Civil Procedure Code be added or substituted as a party on either side of the record⁴ and the suit continued by or against him. But the Court has no jurisdiction thus to add a purchaser after decree.⁴

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

Commentary.

This section is singularly meagre in relation to the sources to which it owes its origin. It may be traced to two statutes of the reign of Elizabeth,⁵ in which the law with regard to conveyances in fraud of

1 Anundo Moyee v. Dhonendro, 14 Moo. I. A., 101; s.c., 8 Beng. L. R., 122, explained in Gobind Chunder v. Guru Churn, I. L. R., 15 Cal., 94.

2 Rambhat v. Lakshman, I. L. R., 5 Bom., 630.

3 Bull v. Hutchens, 32 Beav., 615, cited in Tranquebar Sami v. Ammai, 6 Mad. H. C., p. 238.

4 Goodall v. Mussoorie Bank, I. L. R., 10 All., 97.

5 13 Eliz., c. 5, and 27 Eliz., c. 4, repealed by this Act; see as to the applicability of those statutes in India, Azim Unnissa Begum v. Dale, 6 Mad. H. C., p. 455.

creditors or in fraud of purchasers for value, is declared. The section merely reproduces certain of the propositions contained in those statutes, and no attempt is made except in the second clause to represent the result of three centuries of decisions on the statutes.¹

With regard to purchasers, all that the section says is that a transfer made to defraud prior or subsequent purchasers for consideration, is voidable at their option; and that the intent to defraud may be presumed from the absence or gross inadequacy of the consideration. Similarly the statute, 27th Eliz., c. 4, enacts that every conveyance of lands made with the intent to defraud or deceive such persons as have purchased or shall afterwards purchase the same lands for money or other good consideration, shall be deemed to be void against such persons. "It proceeds in section 3 to save from the operation of the statute any conveyance made for good consideration and *bonâ fide*. On the statute the decisions are clear to the effect that the voluntary conveyance of lands, afterwards made the subject of a conveyance for valuable consideration, may be avoided by the subsequent purchaser, although in making the voluntary conveyance there was no actual fraud.² From the fact that the settlor afterwards conveys the land to a purchaser for consideration, it is inferred that the voluntary conveyance was made with intent to defeat the purchaser. "The principle . . . appears to be, that by "selling the property for a valuable consideration, the seller so entirely "repudiates the former voluntary conveyance and shows his intention "to sell, as that it shall be taken conclusively against him and the "person to whom he conveyed, that such intention existed when he "made the conveyance and that it was made in order to defeat the "purchaser."³ It has recently been pointed out by the Judicial Committee in a case where a man, having made a gift of lands for charitable purposes, afterwards conveyed part of the same land to a third person for value, that when a gift is made to a charity there is no presumption that fraud was intended, and therefore such a gift is not to be treated as covenous, and is not avoided by the subsequent conveyance for value.⁴ With regard to the question of consideration, the Courts in

1 See *Twyne's case*, 1 Smith's L. C., 8th ed., p. 1, and *Ellison v. Ellison*, 1 W. & T. L. C., 6th ed., p. 291, and notes thereto; and see note to section 42, *ante* p. 99, as to assignments of leasehold; see *Price v. Jenkins*, 5 Ch. D., 620.

2 1 Smith's L. C., 8th ed., p. 40. See however 56 and 57 Vict., c. 51, section 2, saving voluntary conveyances made without fraudulent intention and in good faith.

3 *Doc v. Rusham*, 17 Q. B., 721; *Judah v. Mirza Abdool*, 22 W. R., 60; *Joshua v. Alliance Bank of Simla*, 1 L. R., 22 Cal., 185, where this section is discussed.

4 *Ramsay v. Gilchrist*, [1892] App. Cas., 412.

deciding whether a prior conveyance is voluntary or not do not enter into the quantum of consideration. "The question is whether the transaction was one of bargain or of gift merely."¹ The want of consideration for the first conveyance being admitted, that conveyance necessarily gives way to the later conveyance, and thus the only question that can arise is whether the subsequent purchaser gave consideration. It is not necessary for him to show that he had no notice of the voluntary conveyance. "It must be assumed," said Grant, M.R., "that a voluntary settlement, however free from actual fraud, is by the operation of that statute (27th Eliz.) deemed fraudulent and void against a subsequent purchaser for a valuable consideration, even when the purchase has been made with notice of the voluntary settlement."² He added however that he had great difficulty in persuading himself that the words of the statute warranted or that the purpose of it required such a construction, for it was not easy to see how a purchaser could be defrauded by a settlement of which he had notice before he made his purchase. The principle above stated is not applicable when the seller is a different person from him who executed the voluntary settlement, "for the acts of one man cannot show the mind and intention of another."³ Therefore a purchaser who takes from the devisee or heir of the settlor or by sale in execution of a decree against him, cannot defeat the voluntary settlement.⁴ Moreover when the settlement is defeated, it is only defeated so far as is necessary to give effect to the subsequent conveyance.⁵ The question must arise how far these decisions on the statute are to be followed in interpreting the section. Perhaps it may be surmised that in spite of the English cases the Indian Courts will not go to the length of avoiding a voluntary conveyance at the instance of a purchaser who had notice of it. There is no fraud in such a case, and no apparent reason why the purchaser should be preferred.⁶

There is another class of cases to which the section would clearly apply. For instance, where a person voluntarily gave his sisters a mortgage to secure an antecedent debt, and the sisters allowed him to retain the deeds in order that he might deal with the estate in favour of third parties, it was held that the mortgage to the sisters was void as against a mortgage made to a third party.⁷ Here it will be observed

1 *Townend v. Toker*, L. R., 1 Ch., p. 458.

2 *Buckle v. Mitchell*, 18 Ves., 100; and see, 1 Smith's L. C., 8th ed., p. 40.

3 *Doe v. Busham*, *supra*.

4 *Godfrey v. Poole*, 13 App. Cas., 497.

5 *Dolphin v. Aylward*, L. R., 4 H. L., 486.

6 See *Joshua v. Alliance Bank of Simla*, I. L. R., 22 Cal., 202.

7 *Perry-Herrick v. Attwood*, 2 De G. & J., 21; *Clarke v. Palmer*, 21 Ch. D., 124.

that the first conveyance was not without consideration. Yet it was held to have been made in fraud of the subsequent mortgagee. Similarly in a more recent case, where one Turnley, at a time when he had been actually sued by the plaintiffs for a sum of money which he was unable to pay, executed in favour of his step-daughter a mortgage to secure a loan made some years previously, it was held that the plaintiffs who, after recovering judgment, took a mortgage of the same property in ignorance of the previous mortgage, were entitled to have it avoided under the statute.¹ It was found that Turnley had made the mortgage to his step-daughter to be used if he thought it convenient, but with the secret intent that the same, being kept in his own possession, should be at his free disposition, so that if he did not wish to bring it forward, he could keep it secret and get an advance of money by conveying the estate to other parties. In these circumstances the statute was held to be applicable.

Where the owner of land first mortgaged it by an unregistered instrument to B for a sum below Rs. 100 and, when B was in possession as mortgagee, gave a possessory mortgage of the same land to C who knew that B was in possession under his mortgage, it was held by the Allahabad High Court that the present section was applicable and that, as the second mortgage was a fraud on B, it should not, though registered, be preferred to B's mortgage.²

As against the creditors of the transferor, the section says that every transfer, made to defeat or delay them, is voidable at the option of the person so defeated or delayed. The statute—13 Eliz., c. 5—after reciting that it is made for the avoiding and abolishing of feigned, covenous and fraudulent feoffments, grants, &c., as well of lands as of goods and chattels which feoffments, &c., are devised and contrived of malice, fraud, &c., to the end and purpose to delay, hinder and defraud creditors of their just and lawful actions, &c., enacts that every feoffment, &c., made for any intent or purpose so declared, shall be deemed and taken only against the person whose action shall be in anywise disturbed, hindered, delayed or defrauded, to be clearly and utterly void. As in the present section there is a proviso for the protection of purchasers in good faith and for consideration. It has been said that the statute is merely declaratory of the common law,³ and it may equally be said that the

¹ *Cracknell v. Janson*, 11 Ch. D., 1.

² *Ram Antar v. Dhanauri*, I. L. R., 8 All., 540; see further note 3 to section 54 on the conflict between registered and unregistered instruments.

³ *Cadogan v. Kennett*, Cowp., 434; *Benjamin on Sale*, 3rd ed., p. 456.

present section merely declared as to creditors the law which theretofore prevailed in India.¹ When a disposition of property, whether in the form of gift, sale or mortgage, is in fact a mere sham devised for the purpose of putting the property out of the reach of creditors, there can be no doubt that creditors can avoid it though it may be valid and operative as between grantor and grantee.² The intention being that the ostensible donee or purchaser should in fact take no beneficial interest, but be a trustee for the debtor, the creditors are entitled to treat the property as still belonging to the debtor. This was the nature of the transaction in *Twyne's* case,³ and cases have been decided in this country on the same principle.⁴ The circumstances that led to the decision in favour of the creditor in *Twyne's* case were (1) that the grant comprised all the debtor's property, (2) that he continued in possession notwithstanding, (3) that it was made secretly, (4) that it was made pending the writ. In considering these points the question whether or not there was consideration for the alienation has to be taken into account. In *Twyne's* case there was consideration for the grant, inasmuch as the grantee was a creditor of the grantor, and, apart from cases in which a debtor's property has to be distributed under the law of insolvency or bankruptcy and questions of fraudulent preference arise,⁵ the law does not forbid a debtor favouring any particular creditor to the prejudice of the others.⁶ Nevertheless in view of the circumstances stated, the grant was held to be void and not to be saved by the proviso in favour of purchasers in good faith for value. According to the view recently expressed in a Calcutta case the section goes much further than the statute of Elizabeth and gives creditors the right to avoid conveyances which according to the English cases⁷ would not be voidable. The

1 *Abdool Hye v. Mir Mohomed Mozaffar*, L. R., 11 I. A., 10; s.c., I. L. R., 10 Cal., 616.

2 *Chenvirappa v. Puttappa*, I. L. R., 11 Bom., 708; see cases cited in *Burjorji v. Dhunhai*, I. L. R., 16 Bom., p. 18, and note 8 to section 6, ante p. 36.

3 1 Smith's L. C., 8th ed., p. 1.

4 *Rajan v. Ardesbir*, I. L. R., 4 Bom., 70; *In re Umbica Nundun*, I. L. R., 3 Cal., 434; *Musadee Mahomed v. Ally Mahomed*, 6 Moo. I. A., 27; *Gnanabhai v. Srinivasa*, 4 Mad. H. C., 84; *Sankarappa v. Kamayya*, 3 Mad. H. C., 231; *Rangilbhai v. Vinayak*, I. L. R., 11 Bom., 666; *Hormusji v. Cowasji*, I. L. R., 13 Bom., 297.

5 See section 351 (c) of Civil Procedure Code and *Joakim v. Secretary of State*, I. L. R., 3 All., 530; *Dadapa v. Vishundas*, T. L. R., 12 Bom., 424.

6 *Sankarappa v. Kamayya*, 3 Mad. H. C., 231; *In re Dhanjibhai*, 10 Bom. H. C., 327; *Suba Bibi v. Balgobind*, I. L. R., 3 All., 178; and see 1 Smith's L. C., 8th ed., p. 25.

7 *Ex parte Games*, 12 Ch. D., 324, and case there cited: see *Seshamma v. Chenappa*, I. L. R., 20 Mad., 467.

point actually decided was that the purchaser's knowledge of an impending execution is not inconsistent with good faith on his part.¹ Generally, it is submitted, the question must be whether the debtor and the purchaser have contrived the transfer as a cloak to protect the property for the benefit of the debtor, because it is not likely that any person would, except with that object, transfer his property for a grossly inadequate consideration.² It is not likely that a man in order merely to spite one creditor would confer a great benefit on another, and derive no advantage for himself. The gross inadequacy of consideration is by the second paragraph of the section made ground for presuming an intent on the transferor's part to defeat creditors; but it is not said that this circumstance can be used against the transferee as a ground for imputing bad faith to him and there clearly must be evidence that he being a purchaser for consideration was a party to the fraudulent intent of the transferor.³ The mere fact of a creditor being defeated, though the natural result of the conveyance, is not sufficient ground for impeaching it.⁴ And again the generality of the conveyance is only a circumstance to be taken into consideration with others.

On the other hand, when it is a gift and not a conveyance for value, the fact that the debtor denudes himself of all his property is almost conclusive to prove his fraudulent intent, and that proof is sufficient inasmuch as the proviso has no application. If a man indebted at the time makes a gift which has the effect of withdrawing from his creditors the whole of his property, or so much of it that he is left without enough in his hands to pay his debts, the inference is that he meant to defeat his creditors, that being the necessary consequence of his act. Thus, Jessel, M.R., said in a recent case:—

“A man is not entitled to go into a hazardous business, and immediately before doing so to settle all his property voluntarily; the object being, ‘If I succeed “in business I make a fortune for myself. If I fail I leave my creditors unpaid. “They will bear the loss.’ This is the very thing which the statute of Elizabeth “was meant to prevent.”

When the alienation impeached is voluntary and without consideration and no express intent to defraud is proved, the amount of the donor's indebtedness at the time of the alienation may thus become

1 *Tehan Chunder v. Bishu Sirdar*, I. L. R., 24 Cal., 825; see however *Joshua v. Alliance Bank of Simla*, I. L. R., 22 Cal., 201.

2 *Motilal v. Utam*, I. L. R., 12 Bom., 434; *Gopal v. Bank of Madras*, I. L. R., 16-Mad., 397.

3 *In re Johnson*, 20 Ch. D., 389, citing *Holmes v. Penney*, 3 K. & J., 90.

4 *Ex parte Russell*, 19 Ch. D., 588, following *Mackay v. Douglas*, L. R., 14 Eq., 106.

decisive. A gift or voluntary settlement is not voidable because the maker owed some debts at the time.¹ If it were so, few persons, and none engaged in commercial business, could make gifts at all. It is only when the indebtedness amounts to insolvency, in the sense that the giver has not, after making the gift, wherewithal to satisfy his creditors, that a fraudulent intent can properly be inferred. In some of the cases on the statute the Courts seem to have gone to the length of holding that, if the necessary effect of a voluntary deed is to defeat creditors, it is void under the statute, although there was no such intent in the debtor's mind when he executed it. Where a father in consideration of annuities for his life distributed his property among his children at their instance without any regard to the claims of his creditors, it was held that though there was no intention on his part to defeat creditors the transaction was void against them and the donees were called upon to contribute rateably to the debt.² It would be otherwise if the grantor reserved property in his own hands sufficient to satisfy his debts, and the fact that the property so reserved does not lie within the jurisdiction of the Court, in which the creditor, impeaching the conveyance, holds a decree, is immaterial.³ In a recent case⁴ it appeared that a master-mariner, who was at the time solvent, had settled on his wife a legacy of £500, to which he unexpectedly became entitled, and which was the only property he had to settle. At the time of doing so he had been served with a writ in an action for breach of promise of marriage, which, however, he averred, did not influence him in making the settlement, for he expected the action to come to nothing. The action resulted in a verdict against him for £500. It being found on the facts that the defeating of his creditors was not the necessary consequence of the settlement, and was not intended to be so, the deed was held not to be void under the statute. Lindley, L.J., was not prepared to say that a voluntary settlement can never be set aside under the statute, as it has been construed, unless there has been in fact an intention to defraud. The question is, not whether there be any debt in existence which was due prior to the voluntary conveyance, and which in the result has been unpaid, although the transferor continued solvent for a while; but whether from all the circumstances the Court can infer that the

¹ *Gnanabhai v. Srinivasa*, 4 Mad. H. C., pp. 84, 87.

² *Cornish v. Clark*, L. R., 14 Eq., 184; *Rangillbhai v. Vinayak*, I. L. R., 11 Bom., 666; *Burjorji v. Dhunbai*, I. L. R., 16 Bom., p. 14; see section 128 and note.

³ *Nasir Husain v. Mata Prasad*, I. L. R., 2 All., 891.

⁴ *Ex parte Mercer*, 17 Q. B. D., 290; *Freeman v. Pope*, L. R., 5 Oh., 538, considered; *In re Johnson*, 20 Ch. D., 389.

conveyance was made with the intent, actual or constructive, of delaying or hindering creditors.¹

The circumstance that the purchaser or donee is not placed in possession, may be used to prove fraud, as going to show that the alienation was not intended to have any actual operation or that there was a secret trust in the grantor's favour. But by itself it is at most only *primâ facie* evidence; its weight also depends on the nature of the property and of the particular transaction. With a mortgage of land, the fact that possession is not given is no evidence of fraud² and, even where goods are concerned the continued possession of the vendor³, when consistent with the deed, is not of itself enough to make the sale fraudulent.⁴ Another circumstance to be considered as rebutting the presumption of fraud, is the notoriety of the transaction.⁵ According to the words of the section a transfer made to defeat or delay creditors is voidable at the option of any person so defeated or delayed. According to the cases on the statute however it seems that a suit brought to impeach such a transfer must be brought on behalf of all creditors and cannot be maintained by one individual creditor.⁶

It has been observed that except under the law relating to insolvency⁷ a conveyance is not voidable because it was made in favour of one creditor in order to defeat another. So a conveyance of the debtor's whole property to a trustee, for the benefit of all the creditors indifferently, is not affected by the circumstance that it was made to defeat any particular creditor, though he may have obtained a decree. There is no principle "which supports the position that a deed which contemplates the full payment of all creditors as its primary object can be held void as intended to defeat or delay creditors."⁸ Unless the creditor has attached the property, or otherwise obtained a lien on it, the conveyance when completed will prevent his taking the debtor's property in execution of his decree. Such a conveyance is valid as well against those who have assented to it as against other creditors,⁹ and unless it is made voluntarily, *i.e.*, without pressure and of the debtor's own motion, it is

1 Freeman v. Pope, L. R., 5 Ch., 543; and see 1 Smith's L. C., 8th ed., p. 37.

2 Twyne's case, 1 Smith's L. C., 8th ed., pp. 15, 16; Benjamin on Sale, 3rd ed., p. 460; Martindale v. Booth, 3 B. & Ad., 498.

3 Benjamin on Sale, 3rd ed., p. 461.

4 Burjorji v. Dhunbai, I. L. R., 16 Bom., 1.

5 See as to fraudulent preference section 24 of the Insolvency Act¹⁹¹⁴ and section 351 (c) of the Civil Procedure Code.

6 Godfrey v. Poole, 13 App. Cas., 497.

7 Pickstock v. Lyster, 3 M. & S., 371; Wolverhampton Bank v. Marston, 7 H. & N., 448; Harland v. Binks, 15 Q. B., 713.

equally valid against the Official Assignee.¹ But such a conveyance, unless passing a beneficial interest to the trustee, is not complete and therefore not good against creditors, till some of them have assented to it.² A conveyance for the benefit of creditors not communicated to any of them operates as a mere direction, and is revocable by the debtor who has made it.³ It is only when by the assent of some creditor the relation of *cestui que trust* and trustee has been established between him and the assignee, that the assignment is valid against the creditors generally. A trust deed in which the debtor, besides directing his trustee to pay his debts, creates an ultimate trust for the benefit of his wife and children, stands on a different footing and is irrevocable and binding upon him.⁴ It is also provided by section 128 that where a gift consists of the donor's whole property the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

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¹ *In re Dhanjibhai*, 10 Bom. H. C., 327.

² *Siggers v. Evans*, 24 L. J. Q. B., 305.

³ Indian Trusts Act, II of 1882, section 78; *Johns et James*, 8 Ch. D., 744, following *Garrard v. Lauderdale*, 2 Russ. & My., 451; *Rangilbhai v. Vinayak*, I. L. R., 11 Bom., p. 678.

⁴ *Golam Yassin v. Official Trustee of Bengal*, I. L. R., 8. Cal., 887; see too *Siggers v. Evans*, 24 L. J. Q. B., 305, where the trustee being a creditor took a beneficial interest.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

- [1] **54.** "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
"Sale" defined.
- [2] Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
Sale how made.
- [3] In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
- [4] Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
- [5] A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
Contract for sale.
- [6] It does not, of itself, create any interest in or charge on such property.

Commentary.

Note 1. With this paragraph may be compared section 77 of the Indian Contract Act, which says:—"Sale is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer." To make a contract of sale complete and enforceable, all the terms of it must be fixed and the price ascertained or

Elements of a valid sale.

in some definite way ascertainable.¹ 'Price' includes money only, for if the thing given in exchange for land consists of goods and not money there is no sale but an exchange.² The amount of the price, like the nature of the consideration in contracts generally, is a matter on which the parties may judge for themselves, and even gross inadequacy is no defence to a suit for specific performance, if the property is one as to the value of which both parties were equally in the dark.³ But gross inadequacy of price may, with reference to the state of things existing at the date of the contract, be evidence of fraud or of undue advantage taken by the plaintiff, and so an answer to such a suit.⁴ The ownership passes to the purchaser on the due execution and delivery and, if necessary, the registration of the conveyance, and cannot be re-vested in the vendor except by a re-conveyance. The purchaser is none the less owner because the purchase-money remains unpaid,⁵ though he will not be entitled to possession except on condition of first paying the purchase-money.⁶ Similarly, it is not open to third parties to object that there was no consideration.⁷ But it may be open to the ostensible seller when sued for possession, to defend himself by proving that the transaction was fictitious, no real passing of the property having been intended.⁸ Moreover it is competent to a person who has executed an instrument of sale or any other instrument to show that it was not intended to have immediate operation (Evidence Act, section 92). The instrument is then a mere escrow and does not become a deed until the condition has been performed or the specified time has arrived.⁹

1 *Dart's Vendors and Purchasers*, 6th ed., p. 256.

2 See note to section 118 and *Queen-Empress v. Appava*, 1 L. R., 9 Mad., 141.

3 *Baxendale v. Seale*, 19 Beav., 601; *Jofferys v. Fairs*, 4 Ch. D., 448; Indian Contract Act, section 29.

4 Specific Relief Act, I of 1877, section 28.

5 *Umedmal v. Dava bin Dhondiba*, 1 L. R., 2 Bom., 547; *Tatia v. Babaji*, 1 L. R., 22 Bom., 183; *Annavudavam v. Iyasawmy*, 6 Mad. H. C., 69.

6 *Shib Lal v. Bhagwan Das*, 1 L. R., 11 All., 244; *Iktal Begam v. Ghibind Prasad*, 1 L. R., 3 All., 77; *Mohun Sing v. Shib Koonwer*, 1 Agra, 85; *Achobandil v. Mahabir*, 1 L. R., 8 All., 641.

7 *Monishankar v. Bai Mali*, 1 L. R., 12 Bom., 686; *Kachu Bayaji v. Kachoba*, 10 Bom. H. C., 491. See *Walker v. Bradford Old Bank*, 12 Q. B. D., 511.

8 *Babaji v. Krishna*, 1 L. R., 18 Bom., 372; *Nana v. Rautmal*, 1 L. R., 22 Bom., 257; a mere *benamidar* has no title and therefore cannot sue to recover the property, *Hari Gobind Akmoy*, 1 L. R., 16 Cal., 364; *Sham Lal v. Amarendro*, 1 L. R., 23 Cal., 460; *Chinnan v. Ramachandra*, 1 L. R., 15 Mad., 51, but see *Nand Kishore v. Ahmad*, 1 L. R., 18 All., 69; and *Sachitananda v. Balaram*, 1 L. R., 24 Cal., 644.

9 *Xenos v. Wickham*, L. R., 2 H. L., 321; see *Ponnayya v. Muttu*, 1 L. R., 17 Mad., 146.

Note 2. The Registration Act, 1877, to which this and the next paragraph are to be read as supplemental, makes it compulsory to register any non-testamentary instrument which purports or operates "to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property."¹ And "immoveable property" according to section 3 of the same Act includes "land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, or things attached to the earth or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops, or grass."²

The effect of this paragraph is that a transfer by way of sale of any thing thus denoted as immoveable property must necessarily be made by a registered instrument, unless the thing in question, being tangible property, is below the value of one hundred rupees. Except in that case the execution of an instrument is no longer optional, while the registration of the instrument executed is, as it was under the Registration Act, compulsory. In a case, however, where the co-sharers of a village had according to the conditions of their tenure a right of pre-emption in case any of them should "wish to transfer his share wholly or partly by sale or mortgage," and one of them delivered possession of his share to a stranger for Rs. 300, but executed no sale-deed, it was nevertheless held that the effect of the transaction was to transfer absolutely the whole right of possession to the vendee, so as to come within the meaning of the *wajib-ul-arz* and to give rise to the right of pre-emption.³ This case was distinguished in a recent case, where the defendant had been put into possession of land above Rs. 100 in value under an oral contract of sale, but had failed to pay the purchase-money. It was held that the property had not passed to the defendant.⁴

The distinction between tangible and intangible property may be compared with that made by English law between corporeal and incorporeal hereditaments. The latter, which comprise such rights as easements, corodies, franchises, annuities and rents, can be transferred by deed only; and are therefore said to lie in grant and not in livery. Only for corporeal hereditaments was feoffment which implies livery, the proper

1 Act III of 1877, section 17.

2 See *ante* note 1 to section 3 and note to section 5.

3 *Janki v. Girjadat*, I. L. R., 7 All., 482, Mahmood, J., diss.

4 *Papireddi v. Narasareddi*, I. L. R., 16 Mad., 461; see, however, *Regam v. Muhammad*, I. L. R., 16 All., 350, and *Ittappan v. Parangodan*, I. L. R., 21 Mad., 291.

mode of transfer.¹ By 'tangible' property is no doubt meant lands, buildings, &c., which immediately or through the medium of tenants may be the subject of possession deliverable by the seller to the buyer.² By the phrase 'reversion or other intangible thing,' it is apparently intended to denote all the various interests which are included under the general title, immovable property, but do not any more than choses in action involve possession. Why the case of a reversion in particular should be mentioned it is not easy to understand, since it would seem that the right of redemption by a mortgage or the right of a mortgagee, and in fact any benefit to arise out of land must equally and without regard to value be conveyed by a registered instrument. It has, however, been held that the transfer of a hypothecation executed to secure a debt under Rs. 100 does not require registration.³

This paragraph and the next are extended to cantonments by Act XIII of 1889.

Note 3. In the case of tangible immovable property less than one hundred rupees in value, there are two modes only in which a purchaser can acquire a title. There must be either a registered instrument of sale, or else delivery of possession either with or without a deed which need not be registered.⁴ And so it has been held that a person claiming possession, of such land under an unregistered instrument of sale is not entitled to possession even against the person who purported to sell the land.⁵ The ordinary rule is that if the owner purports to convey a piece of such property at different times by either mode to different persons, the later created right would give way to the right previously created.⁶ If the property were conveyed by mere delivery to one person and subsequently made the subject of a registered conveyance in favour of another person, the latter would necessarily be postponed. This would have been the case under the Registration Act; for section 48 of that Act makes an exception in favour of an oral agreement or declaration accompanied or followed by delivery of possession.⁷

1 1 Steph. Commentaries, 8th ed., pp. 656, 691; see *ante* note to section 5.

2 Compare section 145, Criminal Procedure Code, and *Krishna Dhone v. Troilokia*, I. L. R., 12 Cal., 539.

3 *Subramanian v. Perumal*, I. L. R., 18 Mad., 454.

4 *Gunga Narian v. Kalichurn*, I. L. R., 22 Cal., 179.

5 *Makhan Lal v. Bunku Behari*, I. L. R., 19 Cal., 623; overruling *Khatu Bibi v. Madhuran*, I. L. R., 16 Cal., 622.

6 See section 48.

7 *Palani v. Selambara*, I. L. R., 9 Mad., 267.

If tangible immoveable property of a value less than a hundred rupees is made the subject of an unregistered instrument purporting to be a conveyance in favour of one person, and the same property is subsequently conveyed by a registered instrument to another purchaser, section 50 of the Registration Act of 1877 becomes applicable. That section declares that such document "shall, if duly registered, take effect as regards the property comprised therein against every unregistered instrument relating to the same property and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not." An explanation is appended which makes the section apply retrospectively in favour of documents registered under the Act of 1877 against documents optionally registrable under former Registration Acts.¹ The section applies only if both documents are legally valid instruments and in their nature antagonistic to each other. Registration of course gives no effect to a forged or otherwise invalid instrument.² And there is no conflict between two documents when under the later of them the purchaser takes subject to the incumbrance created by the earlier document.³ The effect of the section was, and is, so far as conflict can now arise between an unregistered and a registered instrument, that, although primarily a valid title would pass from the vendor by the unregistered document and he would therefore have nothing left to convey by another instrument, that title is liable to be divested in favour of the subsequent registered purchaser.⁴ There seems now to be no doubt that the fact of the unregistered purchaser having taken possession does not by itself put him in a better position.⁵ Having taken an instrument he cannot appeal to section 48 of the Registration Act, for the case provided for in that section is one in which there is no writing and registration is therefore impossible.⁶ Provided that there is no notice of the prior title from which fraud can be inferred, the title of the registered purchaser prevails notwithstanding the priority in time of the unregistered document; and the fact that the holder of the unregistered document has subsequently obtained a money-decree upon it does not place him in any

1 Janki Prasad v. Sri Mautangui, 1 L. R., 7 All., 577.

2 Cooper v. Vesey, 20 Ch. D., 611; Ram Autar v. Dhanauri, 1 L. R., 8 All., 540.

3 Kishorbhui Gallabhai v. Jorabhai Daji, 7 Bom. H. C., (A. C.), 56; Sobhagchand v. Bhatehund, 1 L. R., 6 Bom., p. 208; Ramachandra v. Krishna, 1 L. R., 9 Mad., 495.

4 Fuzluddeu v. Fakir Mahomed, 1 L. R., 5 Cal., 336; Narain Chunder v. Dataram, 1 L. R., 8 Cal., 597; see Krishnamma v. Surannan, 1 L. R., 16 Mad., p. 166.

5 See post p. 139 as to the effect of possession in giving notice to the registered purchaser and thus depriving him of the benefit of registration.

6 Compare White v. Neaylon, 11 App. Cas., 171.

better position.¹ The decree or order which under section 50 of the Registration Act is not to be affected by a registered instrument is a decree or order made prior to the execution and registration of that instrument.²

Under the present Act optional registration being abolished in the case of sales of tangible immoveable property under one hundred rupees in value, the conflict for which section 50 of the Registration Act makes provision cannot in such cases arise between buyers, for by the unregistered instrument no conveyance is effected. There can be no competition unless in both cases a valid mode of conveyance has been adopted.³ If both instruments are registered, priority in date of execution determines the precedence.⁴ In a Bombay case where two instruments of sale were executed on the same day and under the later of the two the purchaser was put in possession, it was held that the latter having completed his title according to Hindu law took precedence over the other purchaser whose title remained imperfect. It was left an open question how the conflict between two registered instruments of the same day should be decided in cases where neither purchaser took possession.⁵ If the first purchaser takes possession and also takes an unregistered instrument, that is, an instrument having no legal effect, it would seem to follow that, as between him and a subsequent registered purchaser, the conflict would be between such purchaser and the holder of a title by possession, and, as for such a conflict no special provision is made, the rule of priority in time would hold good.

Inasmuch as registration still remains optional in the case of mortgages, the cases for which section 50 of the Registration Act provides may arise as well with regard to instruments of that nature executed after the 1st July 1882 as with regard to those executed at an earlier date. In a case where a mortgage of 1872, not registered under the Act of 1871 then in force, came into competition with a mortgage of 1880 registered under the Act of 1877, it was held that the latter must prevail.⁶ As regards transactions to which the Registration Act of

Cases in which conflict can arise.

1 *Himalaya Bank v. Simla Bank*, I. L. R., 8 All., 23.

2 *Jagrup Rai v. Kabhey Singh*, I. L. R., 13 All., 288.

3 e.g., there can be no competition between two instruments both compulsorily registrable, *Hicks v. Powell*, L. R., 4 Ch., 741.

4 See section 47 of Registration Act, *Santappa v. Narayan*, I. L. R., 8 Bom., 182.

5 *Lalubhai v. Bai Amrit*, I. L. R., 2 Bom., 299.

6 *Janki Prasad v. Sri Mantangui*, I. L. R., 7 All., 577: see *Shivram v. Saya*, I. L. R., 13 Bom., 229.

1877 is applicable, the cases where a competition can arise are those where there is on the one hand an unregistered instrument of mortgage for an amount under Rs. 100 or an unregistered instrument of sale of property not exceeding that amount in value, executed before the 1st July 1882, and on the other hand an instrument of mortgage of later date registered compulsorily or optionally, or a registered instrument of sale in respect of which, if executed before the 1st July 1882, the registration might have been optional. Further, a claim in competition with one based on a registered instrument may be founded on possession, if delivery of possession is sufficient to give a title to the property. In the case of any sale or mortgage made before the 1st July 1882 a title might be acquired by possession; while as to transactions subsequent to that date possession would operate to give a title only to vendees of property under Rs. 100 in value or to mortgagees for a sum under the same amount, not being simple mortgagees. As between two unregistered mortgages for sums under Rs. 100 priority in date gives precedence; and this precedence is not lost by the later mortgagee purchasing the property in execution of his decree and obtaining a registered conveyance. As purchaser no less than as mortgagee he holds subject to the prior mortgage¹

For the cases where title by possession comes into conflict with a registered instrument, section 48 of the Registration Act makes provision. Possession taken under an oral agreement prevails against a subsequent registered instrument. This section however does not protect one who, having taken an unregistered document, also obtains possession,* though the fact of possession may, as will be seen, become important as evidence of notice to the registered purchaser of a prior title.²

In reference to the statement that there may be a competition between an instrument optionally registrable but not registered and one compulsorily registered, it must be noted that this case can only arise when the latter instrument has been registered under the Act of 1877. The Act has been held not to be retrospective, save so far as to give a document registered under the Act an

Conflict between titles by possession and by registered conveyance.

Conflict between optionally registrable and compulsorily registered conveyances.

¹ *Maganlal v. Shakra*, 1. L. R., 22 Bom., 945.

² *Fuzluddeen v. Fakir Mahomed*, 1. L. R., 5 Cal., pp. 342, 346; *Bimaraz v. Papaya*, 1. L. R., 3 Mad., 46; *Sambhubhai v. Shivilaldas*, 1. L. R., 4 Bom., 89; *Moreswar v. Dattu*, 1. L. R., 12 Bom., 569.

³ *Dundaya v. Chenbasappa*, 1. L. R., 9 Bom., 427; see *post* p. 139.

advantage over a document which might have been but was not registered under the earlier law.¹ Section 50 has therefore no application in a case where the instrument has been registered under a prior Act. Under the earlier Acts the only possible competition is that which may arise between optionally registrable instruments,² and thus the purchaser in 1871 to whom registration was optional had nothing to fear from the compulsory registration of a conveyance executed in 1872. His prior title prevailed.³

As to transactions to which the Act of 1877 has no application, it has been held that a mortgagee who obtained a complete title with possession in 1861 was not to be postponed to a purchaser who registered his deed of sale under Act XX of 1866.⁴ On the other hand, where there was a mortgage unregistered and without possession in 1859 and a sale in 1867 duly registered under the Act of 1866, it was held that the purchaser's title was good against the mortgagee.⁵

The question as to the effect of notice in depriving a purchaser of the advantage which his registered conveyance gives him under the Registration Act has been much discussed. In England and Ireland there is no doubt that registration gives no advantage to a purchaser who has taken with notice of a prior dealing with the property. The policy of the Acts, being to prevent fraud and secure publicity, does not require that the protection which registration gives should be extended to a purchaser who has had notice of a previous dealing with the property. Lord Cairns, speaking of the Irish Registration Act, said:—"I take the explanation to be this, that inasmuch as the object of the statute is to take care that by the fact of deeds being placed upon a register those

¹ *Shib Chandra v. Johobux*, I. L. R., 7 Cal., 570; *Bholanath v. Baldeo*, I. L. R., 2 All., 198; *Lachman Das v. Dipchand*, *ib.*, 851; *Sri Rām v. Bhagirath*, I. L. R., 4 All., 22; *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 179; *Kanitkar v. Joshi*, I. L. R., 5 Bom., 442 approved in *Icharam Kalidas v. Govind Ram*, *ib.*, 653; *Kallacolathuran v. Subbaroya*, I. L. R., 3 Mad., 73; *Kondayya v. Guruvappa*, I. L. R., 5 Mad., 139.

² *Oghra Singh v. Ablakh*, I. L. R., 4 Cal., 536; *Shaikh Rysatulla v. Doorga Churn*, 15 Beng. L. R., 294, *contra* *Kota Muthauna v. Alibeg*, I. L. R., 6 Mad., 174.

³ *Shivram v. Saya*, I. L. R., 13 Bom., 220.

⁴ *Sreemutty v. Moulvie Sadutoollah*, 22 W. R., 3; *Girija Singh v. Giridhari*, 1 Beng. L. R., (A. C.), 14; *Venkatanarsamma v. Ramiiah*, I. L. R., 2 Mad., 108; *Tirumala v. Lakshmi*, *ib.*, 147; *Desai Lallubhai v. Mundas*, I. L. R., 20 Bom., 390; *Timmu v. Deva Rai*, I. L. R., 5 Mad., 265; *Chattar Singh v. Ram Lal*, I. L. R., 3 All., 488.

⁵ *Soodharam v. Odhoy Chunder*, 10 Beng. L. R., 380.

"who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register a deed has *aliunde*, and not by means of the register, notice of a deed affecting the property executed before his own."¹ Taking this view of the Register Acts, the Courts in England have treated as fraudulent the conduct of a person who having notice of a prior incumbrance has taken a registered conveyance. On the principle that fraud cannot be allowed to prevail, the registered purchaser has accordingly been postponed.² As the vendor is not at liberty to derogate from his own grant, so a third person is not at liberty to help him in his fraud.

"The whole doctrine of notice," says *Wootton*, V.C., "proceeds on this—where a man has created a charge affecting his estate he is not at liberty to enter into any new contract in derogation of the interest which he has created. The Court will not allow him to do the wrong himself, nor will it suffer any third person to help him to do it. No one will be permitted to enter knowingly into a contract with a person so situated which would redound to his benefit at the expense of the prior incumbrancer."³

Clear proof of notice is required. "It shall only be in cases where the notice is so clearly proved as to make it fraudulent in the purchaser to take and register a conveyance in prejudice to the known title of another, that we will suffer the registered deed to be affected."⁴

In the Registration Act of 1843 repealing earlier Regulations there was an express provision that registration should give priority,—“any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding;” and some of the earlier cases are to be explained by reference to this provision.⁵ But in the Act of 1864 and in the subsequent Acts no such provision appears. Accordingly in dealing with cases not decided under the Act of 1843, the Courts are now unanimous in applying the doctrine of notice and in holding that the registered purchaser should be deprived of the advantage which registration would otherwise give him, when it is clearly proved that

1 *Agra Bank v. Barty*, L. R., 7 N. L., 135; see *Sreenauth Buttacharjee v. Ramcomul*, 10 Moo. I. A., 220, a case decided under Act XIX of 1813, which contains an express provision excluding the doctrine of notice.

2 *LeNeve v. LeNeve*, 2 W. & T. L. C., 6th ed., 26.

3 *Benham v. Keane*, 1 J. & D., 685.

4 *Wynt v. Barwell*, 19 Ves., 439; *Chadwick v. Turner*, L. R., 1 Ch., 310.

5 See *Lakshmandas v. Dasrat*, L. J. R., 6 Bom., p. 179; *Jivandas v. Framji*, 7 Bom. H. C., (O. C.), 45; *Krishnasami v. Venkatarachella*, 3 Mad. H. C., 89.

he had notice of a prior unregistered instrument.¹ A different opinion prevailed for some time in Madras, but by a recent decision of a Full Bench the law there has been put on the same footing as in the rest of India.² That registration does not protect a purchaser taking with notice of a prior contract of sale against a suit for specific performance of the contract was always allowed as well in Madras as in the other Courts.³

The further question arises as to what is evidence of notice. It has been frequently held here as in England, that *What amounts to evidence of notice.* there must be clear proof of notice.⁴ The fact that the first purchaser has been in possession is generally very cogent evidence of notice,⁵ and in Bombay it has been said to be settled law that possession by a purchaser or mortgagee prior in point of time is notice of his title to subsequent purchasers.⁶ But possession is not conclusive; for it does not necessarily affect purchasers with notice of a prior title. For instance, where D, by an unregistered sale-deed of 1881 conveyed land for Rs. 90 to the plaintiff, but remained in possession as his tenant under a lease which was also unregistered and subsequently sold the same land by a registered deed to the defendant, it was held that, while possession could not in itself give any preference to the unregistered purchaser, such constructive possession as the plaintiff had, afforded no notice of his title to the defendant. The defendant seeing the vendor in possession would have no reason to suppose that he was there otherwise than as owner.⁷

1 *Waman Ramchandra v. Dhondiba*, I. L. R., 4 Bom., 127; *Shivram v. Genu*, I. L. R., 6 Bom., 515; *Dundaya v. Chenbasapa*, I. L. R., 9 Bom., 427; *Mathising v. Kuvarti*, I. L. R., 10 Bom., 105; *Fuzludeen v. Fakir Mahomed*, I. L. R., 5 Cal., 336; *Nemai Charan v. Kokil*, I. L. R., 6 Cal., 534; *Dynonath v. Aluck*, I. L. R., 7 Cal., 755; *Chundernath v. Bhoyrub*, I. L. R., 10 Cal., 250; *Bamasundari v. Krishna*, *ib.*, 424; *Bhalu v. Jakhu*, I. L. R., 11 Cal., 667; *Abool Hossein v. Raghu Nath*, I. L. R., 13 Cal., 70; *Ram Antar v. Dhanauri*, I. L. R., 8 All., 540; *Diwan Singh v. Jadho Singh*, I. L. R., 20 All., 252.

2 *Krishnamma v. Suranna*, I. L. R., 16 Mad., 149, overruling *Nallappa v. Ibrahim*, I. L. R., 5 Mad., 73.

3 *Kadar v. Ismail*, I. L. R., 9 Mad., 119; *Chundernath v. Bhoyrub*, I. L. R., 10 Cal., 250; *Moidin v. Fakir Mahomed*, I. L. R., 11 Mad., 263.

4 *Fuzludeen v. Fakir Mahomed*, I. L. R., 5 Cal., p. 350; *Bhalu v. Jakhu*, I. L. R., 11 Cal., p. 667; *Bamasundari v. Krishna*, I. L. R., 10 Cal., p. 424.

5 *Nani Bibee v. Hafizullah*, I. L. R., 10 Cal., 1073; *Narain Chunder v. Dataram*, I. L. R., 8 Cal., 597.

6 *Dundaya v. Chenbasapa*, I. L. R., 9 Bom., 427; *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., 168, and see note 3 to section 3.

7 *Moreswar v. Dattu*, I. L. R., 12 Bom., 569.

It seems to be assumed in the Act that delivery is not necessary to complete the purchaser's title. Such title to the land, as the person executing the registered conveyance can convey, the purchaser takes on the execution, notwithstanding that the vendor does not or even cannot give possession.¹ The doctrine maintained with regard to Hindus until a recent date by the Bombay High Court that a purchaser taking from one, who was not in possession actual or constructive at the time of sale, acquired no valid title and therefore could not sue in ejectment, has now been finally overruled by the Privy Council.² A sale by one who is thus out of possession has been held not to be a transfer of an actionable claim within the meaning of section 135.³

Note 4. Similarly by the Contract Act (section 90), an act, which has the effect of putting the buyer in possession of goods, is said to be delivery. The question what amounts to possession remains unanswered. As possession of tangible property only is concerned, it might be suggested that actual physical possession was intended, and that a distinction between the case where such possession is feasible and other cases, similar to that made in the Limitation Act, Schedule II, Art. 10⁴ was in view. It may be urged that the publicity and security of a registered instrument was intended to be dispensed with only in cases where actual entry on the land was made and occupation of it visibly taken by the purchaser.⁵ On the other hand it seems more probable that the term possession is used in the wider and more ordinary sense, and that delivery should be said to take place when the owner of property places the buyer in such relation to the land and its actual occupants as he himself occupies.⁶ Otherwise there would be few cases in which land under the value of one hundred rupees could be transferred without a registered instrument, for in the great majority of cases land is in the occupation of a tenant, and physical delivery is impossible.⁷ Even in the case of goods

¹ See *ante* p. 30, and note to section 130.

² *Kalidas v. Kanhaya Lal*, I. L. R., 11 Cal., 121; s.c., L. R., 11 I. A., 218, followed in *Ugarchand v. Madapa*, I. L. R., 9 Bom., 324; *Trikam Madhav v. Hirji*, I. L. R., 18 Bom., 332.

³ *Modun Mohun v. Fattarunissa*, I. L. R., 13 Cal., 297.

⁴ Act XV of 1877, see *Jageshar Singh v. Jawahir*, I. L. R., 1 All., 311.

⁵ As to possession being equivalent to registration, see *Lakshmandas v. Dasrat*, I. L. R., 6 Bom., p. 187, and *see ante* p. 19.

⁶ *Palani v. Selambara*, I. L. R., 9 Mad., 267, a case on section 48 of the Registration Act; as to delivery required *see Gunga Narain v. Kali Churn*, I. L. R., 22 Cal., 179.

⁷ *Narain Chunder v. Dataram*, I. L. R., 8 Cal., 611.

which are generally capable of physical delivery, such delivery is not necessary to change the possession; but it is sufficient that the new possessor should, with the other's consent, assume the control over them which the latter had.¹ In the sense stated, delivery of possession takes place when the seller of land held by a tenant intimates to the tenant the fact of the sale and directs him to hold under and pay rent to the buyer.² In the case of land held on *kanam*, it was held sufficient delivery to make a valid gift, that the donor executed a deed of gift and handed over the *marupatam* (the counterpart of the *kanam* document) to the donee.³ Special provisions are made for delivery on sales of property under the Civil Procedure Code, but of course they only apply to sales in execution of decrees.⁴

Note 5 The contract of sale as distinguished from the conveyance does not require registration. The effect of the contract is not to transfer immediately any interest in the property, but to create a right *in personam*, i.e., the right to have a conveyance executed. And used for that purpose the document embodying the contract is admissible in evidence though unregistered.⁵ It cannot however be used for the purpose of affecting the land. A written agreement to mortgage which might, if registered, be said to create an equitable interest in the land, cannot be used for that purpose if unregistered.⁶ So, in speaking of an agreement to execute a bill of sale, Mollish, L.J., observed:—

“No doubt, *quâ* agreement, it does not require registration; but in my opinion “we ought to hold that an agreement to execute a bill of sale cannot be relied upon

1 See illustrations to section 90 of the Contract Act.

2 Sakalchand v. Dayabhai, 4 Bom. H. C., (A. C.), 70; Harjivan Anandram v. Naran Haribhai, *ib.*, 31; Bank of Hindustan v. Premchand Raichand, 5 Bom. H. C., (O. C.), 83; Palani v. Selambara, *supra*.

3 Wannathan v. Keyakadath, 6 Mad. H. C., 194; and see other cases cited in Mayne's Hindu Law, § 353.

4 Narain Chunder v. Dataram, 1 L. R., 8 Cal., 611.

5 Burjorji v. Muncherji, 1 L. R., 5 Bom., 143; Chunnilal v. Bomanji, 1 L. R., 7 Bom., 310; Shridhar v. Chintaman, 1 L. R., 18 Bom., 396; Bengal Banking Corporation v. Mackertich, 1 L. R., 10 Cal., 315; see Ramasami v. Ramasami, 1 L. R., 5 Mad., 115; Adakkalum v. Theethan, 1 L. R., 12 Mad., 505; Kannan v. Krishnan, 1 L. R., 13 Mad., 324; Nagappa v. Devu, 1 L. R., 14 Mad., 55; Pertab Chunder v. Mohendra Nath, 1 L. R., 17 Cal., 291; s.c., L. R., 16 I. A., 233. Similarly an oral agreement for a charge is valid notwithstanding the provisions of section 59, Appasami v. Manikam, 1 L. R., 9 Mad., 103. But where money is advanced on the security of an unregistered mortgage an equitable mortgage cannot be implied from the fact of the previous deposit of title-deeds, Jaita Bhima v. Haji Abdul, 1 L. R., 10 Bom., 634.

6 Bengal Banking Corporation v. Mackertich, 1 L. R., 10 Cal., 315; see Commissioners of Inland Revenue v. Angus, 23 Q. B. D., 579.

"as being equivalent to an actual bill of sale in equity without involving the "consequence that that brings it within the Bills of Sale Act, and that, if it is not "registered, the Court will look on it as invalid.¹

But it has been held that, when the principal transaction evidenced by the instrument fails for want of registration, a covenant depending upon it and contained in the same instrument must also fail and cannot be enforced. Thus where an unregistered lease for a term of years contained a covenant by the lessee that he would purchase the premises at a certain price in an event which afterwards happened, the suit brought by the lessor on the covenant was dismissed, the lease being one which was compulsorily registrable.²

As between the parties there is a presumption that the breach of a contract for the transfer of immoveable property cannot be adequately relieved by money compensation and, therefore, unless some reason to the contrary is shown, specific performance of the contract will be decreed.³ The obligation imposed on the vendor is one which falls within the terms of section 40 and can accordingly be enforced against a purchaser with notice.⁴ In addition to the relief by specific performance or in substitution for it, the party complaining of the breach may also under certain circumstances obtain pecuniary compensation;⁵ but damages are not given on account of mere delay in performance of the contract.⁶ According to the rule laid down in the English cases and followed in this country, where the vendor without any default on his part is unable to make a good title, the purchaser is entitled to recover only the expenses actually incurred by him and not compensation for the loss of his bargain.⁷ Such special damages are recoverable where the vendor is not really unable to make a good title but does not choose to do so on account of the expense or the like. The purchaser may then recover the profit which he could have made on a re-sale of the property.⁸ The

1 *Ex parte Mackay*, L. R., 8 Ch., pp. 643, 649; *Ex parte Conning*, L. R., 16 Eq., 414; and see *Basawa v. Kalkapa*, I. L. R., 2 Bom., 489, 491; as to effect of agreement for lease see *Walsh v. Lonsdale*, 21 Ch. D., 9.

2 *Sambayya v. Gangayya*, I. L. R., 13 Mad., 308.

3 Specific Relief Act I of 1877, section 12 *et seq.*

4 *Janki v. Girjibat*, I. L. R., 7 All., p. 486.

5 Specific Relief Act, section 19: this section provides for damages as distinguished from compensation proper for which section 14 provides; see *Royal Bristol Building Society v. Bomash*, 35 Ch. D., 391.

6 *Chinnock v. Ely*, 34 L. J., Ch., 399 see illustrations to section 19, Specific Relief Act.

7 *Bain v. Fothergill*, L. R., 7 H. L., 158; *Gas Light Co. v. Towse*, 35 Ch. D., 519; *Pitamber v. Cassabai*, I. L. R., 11 Bom., 272.

8 *Engell v. Fitch*, L. R., 4 Q. B., 659; *Godwin v. Francis*, 39 L. J., C. P., 121.

above-mentioned rule does not apply in the case of a breach of the covenant for title contained in a conveyance as distinguished from the contract to convey. It may here be observed that it is not in all cases necessary for a conveyance to be executed to complete the rights of the purchaser. If he obtains a decree for specific performance against the vendor and pays the purchase-money the transfer is regarded as complete for the Bombay mofussil,¹ as also it is, as far as the parties are concerned, when formal possession is given to one by the Court under an execution.²

Note 6. The mere contract to sell land does not give the purchaser any interest in it of the nature of a right *in rem*. He is not entitled to say, as he can according to English law, that the property belongs to him as from the date when the contract is capable of being enforced specifically.³ The Legislature both in this Act and in the Trusts Act seems to have deliberately eschewed the doctrine of equitable ownership. According to the Trusts Act the beneficiary has merely a right of demand against his trustee corresponding to the obligation imposed on the latter by the trust; he has no estate or interest in the subject-matter of the trust.⁴ Similarly in this Act the contract is declared to give the buyer no interest in the land. But as far as the right of specific performance is concerned the position of the buyer here is the same as in England. The right may under section 40 be enforced against a gratuitous transferee or one who has taken with notice, as to which case reference may be made to section 91 of the Trusts Act⁵ which provides that:—

“where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.”

The buyer has also in respect of purchase-money paid in advance a lien under section 55 (6) (b). According to English law he has an interest which may be disposed of by will⁶ and may be made the subject of insurance.⁷

1 Dhondiba Krishnaji v. Ramechandra, I. L. R., 5 Bom., 551.

2 Lokessur Koer v. Pargun Roy, I. L. R., 7 Cal., 418.

3 Edwards v. West, 7 Ch. D., 858; see Stokes' Introduction to this Act, p. 730. see also Deo Dat v. Ram Autar, I. L. R., 8 All., 206, and note 3 to section 40.

4 Trusts Act (Act II of 1882), section 3 and Stokes' Introduction to Act, p. 823.

5 II of 1882 and see illustration (g) to section 3 of the Specific Relief Act.

6 Dart's Vendors and Purchasers, 6th ed., p. 306.

7 Ib., pp., 197, 913.

It follows from the doctrine of equitable ownership that the purchaser takes the risk of destruction from the date of the contract. Under the Act, on the other hand, it is only from the time when he becomes owner by delivery of possession or by force of a registered instrument that he bears this risk.¹ In the interval between the date of the contract and that of delivery, the vendor is required by section 55 (1) (e) to take such care of the property as a trustee is bound to take, namely, the care which a person of ordinary prudence would take of his own property.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

Rights and liabilities of buyer and seller.

- (1) The seller is bound—
 - [1] (a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;
 - [2] (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;
 - [3] (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;
 - [4] (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;
 - [5] (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

¹ Section 55 (5) (c), and note.

(f) to give, on being so required, the buyer, or such [6] person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in [7] respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing:

(2) The seller shall be deemed to contract with the [8] buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

provided that, where the sale is made by a person in a [9] fiduciary character, he shall be deemed to contract with the buyer, that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule [10] shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been [11] paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, at the cost of

the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled—

[12] (a) to the rents and profits of the property till the ownership thereof passes to the buyer;

[13] (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

[14] (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

[15] (b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

[16] (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

[17] (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all

public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed [18] to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept deli- [19] very of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

Commentary:

A clear distinction exists between the relations of vendor and purchaser under the contract and before conveyance, and the relations of the same persons after conveyance. As with regard to goods so with regard to land circumstances which before conveyance would entitle the buyer to refuse acceptance and to rescind the contract, would not, when once the property has passed, entitle him to the same relief.¹ Circumstances which under the provisions of Chapter IV of the Specific Relief Act afford ground for rescission of the contract, or under those of Chapter II for resisting a suit for specific performance, do not necessarily entitle the aggrieved party to have the conveyance either rectified or

Rights under contract and under conveyance distinguished.

¹ See, e.g., section 117 of the Contract Act.

cancelled. Only on the ground of fraud or mutual mistake can an instrument be rectified under Chapter III of the same Act, while Chapter V provides that any person against whom a written instrument is void or voidable may under certain conditions sue to have it so adjudged. It does not explain the circumstances under which a conveyance is void or voidable. Where there has been a mistake common to both parties and going to the root of the transaction, so that there has been an entire failure of consideration, the purchaser may recover the purchase-money. It was so held in a case where a man having a right to an estate, being ignorant of his own title, purchased it of another.¹ Here of course as in all cases where the instrument is void, no property has passed under the conveyance. Where property has passed and it is sought to impeach the conveyance as voidable, fraud must be alleged, and it is only on the ground of fraud or under a covenant for title or express agreement for compensation that the purchase-money can be recovered or damages claimed.² This distinction is not clearly marked in the section; for it deals in some clauses with the relations of vendor and purchaser under the contract (*e.g.*, (1) (a)—(g)), in others with their relations under the conveyance (*e.g.*, (2), (5) (c) (d)).

Note 1. (a) The omission to make the disclosures required by this clause being declared fraudulent constitutes fraud within the meaning of section 17 of the Contract Act;³ and the contract induced by it accordingly becomes voidable under section 19 of that Act. The latter section will of course apply equally if fraud or misrepresentation of any other kind has been practised; and if the vendor's conduct has been actively fraudulent, as where in the contract for the sale of property subject to a lease the tenant is described as a tenant-at-will, it is not material that the purchaser had the means of discovering the truth.⁴ The duty imposed on the vendor by this clause is not absolute, and therefore does not extend to defects unknown to the vendor.⁵ Nor does it extend to patent defects which the buyer could with ordinary care discover for himself. For instance, the existence of an open right-of-way across an estate, or the ruinous state of buildings is apparent, and therefore attention need not be called to them by the vendor.⁶ Nor is he bound to point out the

Seller's duty (a) to disclose material defects.

¹ *Bingham v. Bingham*, 1 Ves., Sen., 126.

² See *infra* note 8; *Soper v. Arnold*, 37 Ch. D., 96; 14 App. Cas., 429.

³ See last paragraph of the section.

⁴ See Contract Act, section 19, etc.; *Morgan v. The Government of Haiderabad*, I. L. R., 11 Mad., 419.

⁵ Compare section 116 of the Contract Act.

⁶ See *Ashburner v. Sewell*, [1891] 3 Ch., 405.

unprofitable character of mines when the purchaser himself has had an opportunity of examining them.¹ In a case where the defendant offered to take a lease of a seam of coal in the plaintiff's land, the existence of which was unknown to the latter, and the plaintiff agreed to give a lease on certain terms, it was held that the defendant could not resist a suit for specific performance on the ground that after some search he had been unable to discover the coal. There was no warranty, and the defendant had got all that he bargained for, namely, the chance of finding the vein of coal under the particular property.² But if the defect, being known to the seller, is one which even without any artifice on his part is undiscoverable by a buyer exercising ordinary care, the contract is voidable; and a stipulation that the buyer shall take the estate "with all faults" would not apparently according to the English cases alter the matter.³ Instances of defects within this clause are given in illustrations (a) and (c) to section 22 of the Specific Relief Act. The fact that the estate is subject to liabilities, *e.g.*, in the way of mining or sporting rights, interfering with the enjoyment of the property, has been held to be a ground for refusing specific performance.⁴ It would be otherwise if the defect were of a trifling nature, *e.g.*, the rottenness of some boards or joists, or broken panes of glass in a house.⁵ The vendor cannot discharge himself of the duty declared by this clause by inserting a condition in the contract of sale to the effect that the property is sold subject to all rights, easements, &c. If to his knowledge there is a covenant or easement, by which the enjoyment of the property may be prejudiced, and it is not disclosed, the Court will refuse to decree specific performance against the purchaser.⁶

There may be some doubt whether defects, not in the estate itself, but in the title, are intended to come within the clause, or whether the duty imposed on the vendor relates to matters other than those of the class referred to in section 108 (a).⁷ It is apprehended however that the term is not to be so restricted, and that an omission to disclose flaws in

Quære, as to defects in title.

1 Haywood v. Cope, 25 Beav., 140; Sugden's Vendors and Purchasers, 14th ed., pp. 2 and 328; Dart's Vendors and Purchasers, 6th ed., p. 105.

2 Jefferys v. Fairs, 4 Ch. D., 448.

3 Gangadhar v. Kasinath, 9 Beng. L. R., 128; Sugden's Vendors and Purchasers, 14th ed., p. 333.

4 Dart's Vendors and Purchasers, 6th ed., p. 1194.

5 Sugden's Vendors and Purchasers, 14th ed., p. 334.

6 Heywood, v. Mallalieu, 25 Ch. D. 357; Nottingham Patent Brick, &c., Co. v. Butler, 16 Q. B. D., 778; see *post* note 8.

7 Compare section 150 of the Contract Act.

the title or incumbrances which the purchaser has no apparent means of discovering, might equally be fraudulent under the section.¹ In England positive fraud is not necessary to entitle a purchaser to relief, it is enough if he proves concealment on the seller's part of a material defect in the title.² And it is not competent to a vendor failing to disclose such a defect to put forward conditions of sale which are calculated to force a bad title upon his purchaser.³ Even if the information withheld would only have shown that the goodness of the title depended on proof of a previous purchase without notice, the vendor is not entitled to a decree for specific performance, for a purchaser is not bound to accept a title which can only be made good by proof of a fact so open to question as is absence of notice.⁴ The vendor is not bound to point out defects apparent on the face of the title-deeds produced by him to the purchaser who accordingly is affected with notice of their contents.⁵ But when the purchaser has no fair opportunity afforded to him of learning the provisions of a lease affecting the property, specific performance is not decreed against him on its appearing that the lease contains unusual and onerous covenants.⁶ But where a public house stated to be in the occupation of a tenant was sold to a brewer, who bought under the impression that the tenancy was from year to year and refused to perform his contract on learning that there was a lease of which some ten years had to run, specific performance at the vendor's suit was refused. It was said that it was the seller's duty to inform the buyer of matters, which he could not be expected to know with regard to the property, and that the mention of a tenancy conveyed no notice of a lease.⁷ In the English cases of this class relief is given not on the ground of fraud, but on the ground of misdescription, by which, if it relates to a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that but for such misdescription the purchaser would never have entered

1 See *Gajapathi v. Alagia*, I. L. R., 9 Mad., 89; the view above stated was approved in *Haji B-sa v. Dayabhai*, I. L. R., 20 Bom., 529.

2 *Edwards v. M'Leay*, 2 Sw., 287; *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D., 145.

3 *Heywood v. Mallalieu*, 25 Ch. D., 357.

4 *Nottingham Patent Brick, &c., Co. v. Butler*, 16 Q. B. D., 778.

5 *Hyde v. Warden*, 3 Ex. D., 72; *Reeve v. Berridge*, 20 Q. B. D., 523; see *ante* p. 15.

6 *Hyde v. Warden*, 3 Ex. D., 72; *Reeve v. Berridge*, 20 Q. B. D., 523.

7 *Caballero v. Henty*, L. R., 9 Ch., 447; *Morgan v. The Government of Haidera-bad*, I. L. R., 11 Mad., 419; but see *Phillips v. Miller*, L. R., 10 C. P., 420; *Sugden's Vendors and Purchasers*, 14th ed., p. 774.

into the contract at all, the contract is avoided.¹ When the defect or misdescription is not substantial, specific performance with compensation in the shape of abatement of the price may be directed, for generally a purchaser has a right to take what he can get with compensation for what he cannot get.² If the property is discovered to be incumbered, the buyer may compel the seller to redeem and to obtain a conveyance from the mortgagee, or may himself pay off the incumbrances out of the purchase-money.³ But if either from the amount of the incumbrances or otherwise the buyer would not be advantaged by adopting this course, it is apprehended that he would be at liberty to rescind.

In the cases above cited the mistake or material defect was discovered before conveyance or at least before possession or after conveyance. If taken, and the purchaser either sought to recover his purchase-money or resisted a suit for specific performance. If the mistake is discovered after conveyance, the question arises what relief is then open to the purchaser. Is the omission on the vendor's part to be treated as actual fraud entitling the purchaser to relief such as he would obtain on account of fraud in an English Court? Or, in the absence of actual fraud, must he rely on the covenants only? It would seem that this latter question must be answered in the affirmative, and that, in the absence of fraud, of covenants for title, and of a special agreement for compensation, the purchaser cannot recover any compensation for defects which he discovers after he has taken a conveyance, and that even though evicted by a superior title he has under the circumstances stated no remedy. In accordance with this view of the law it has been held in Allahabad that a purchaser who on taking possession finds that the area of the land is short of that mentioned in his sale-deed can recover damages only on proof of fraud.⁶

1 *Flight v. Booth*, 1 Bing. N. C., 370: followed in *In re Davis and Cavey*, 40 Ch. D., 601; and see other cases cited in Pollock on the Principles of Contract, 5th ed., p. 518.

2 Specific Relief Act—Act I of 1877—sections 14 to 17; *Hughes v. Jones*, 31 L. J., Ch., 82; *In re Fawcett v. Holmes*, 42 Ch. D., 150.

3 Specific Relief Act, section 18 (c), and see section 55 (5) (b), *In re Jackson and Oakshott*, 14 Ch. D., 855. Under section 57 he may also apply to the Court for the discharge of the incumbrance.

4 See note 8 *infra*.

5 *Clare v. Lamb*, L. R., 10 C. P., 331; *Sugden's Vendors and Purchasers*, 14th ed., p. 553; *Gajapathi v. Alagia*, I. L. R., 9 Mad., 39; per Lord Blackburn in *Brownlie v. Campbell*, 5 App. Cas., p. 949; *Soper v. Arnold*, 37 Ch. D., p. 102; 14 App. Cas., 429.

6 *Abdullah v. Abdur*, I. L. R., 18 All., 322.

(b) *To produce documents of title.* **Note 2. (b)** The vendor's duty is thus stated by Dart:—

"A vendor, so far as his *prima facie* liability in this respect is not negatived or "restricted by the terms of the contract, must produce to the purchaser all such "documents of title in his possession or power as are necessary in order to deduce a "marketable title for the usual or stipulated period, and must inform him of all "material facts not apparent thereon."¹

It is the purchaser's interest to inquire for title-deeds and demand an explanation if any are not forthcoming, for otherwise he may be fixed with notice that they have been deposited with another person, or otherwise dealt with.² It may be well to remark that, in being required to produce his title-deeds to the buyer, the vendor is not compelled to deliver them to him. The rights of the buyer to their possession are declared later on in the section.³

With reference to documents of title not in the possession of the vendor, but of which he can procure the production, the Act is, except in one case,⁴ silent. Expenses incurred with reference to such documents were borne in England, up to the date of the Conveyancing Act, by the vendor,⁵ and it is presumed that it would be so in this country. If therefore there are any such documents which the purchaser may claim to inspect in order to get a proper deduction of title, but of which the vendor cannot easily obtain the production, he should protect himself beforehand by a special condition.⁶

(c) *To answer questions.* **Note 3. (c)** This clause expresses the rule as stated by Dart, who however adds that:—

"A condition that the purchaser shall be satisfied with certain specified evidence. "merely provides for an assumed absence of better evidence; and does not enable "the vendor to keep back such better evidence if he actually has it, or to withhold "any information which may be in his possession."

In other words, the right to put questions to the vendor under the clause does not affect his duty to make disclosures as required by clause

¹ Dart's Vendors and Purchasers, 6th ed., p. 105.

² See note to section 3, *ante* p. 16 and section 78; *Patman v. Harland*, 17 Ch. D., 353; *Sugden's Vendors and Purchasers*, 11th ed., p. 167, and *Dart's Vendors and Purchasers*, 6th ed., pp. 479, 520, 935.

³ Section 55 (3)

⁴ *Ib.*, proviso.

⁵ *Dart's Vendors and Purchasers*, 6th ed., pp. 159, 470; and see *Conveyancing Act*, 1881—44 & 45 Vic., c. 41—section 3.

⁶ *Wolstenholme on the Conveyancing Acts*, p. 17.

⁷ *Dart's Vendors and Purchasers*, 6th ed., p. 167.

(a). According to English practice the requisitions put by the purchaser must be specific, and so in a recent case a general question as to the knowledge of the vendors or their solicitors of any settlement, fact, deed, omission or incumbrance, affecting the property and not disclosed in the abstract, was disallowed.¹ In English contracts of sale there are usually conditions restricting the purchaser in his requisitions about the title, or binding him to accept certain specified evidence of material facts.²

A condition must, in order to exclude the *prima facie* liability of the vendor to deduce a good title, be expressed in plain and unambiguous terms.³ It may require the purchaser to assume the existence of any fact which the vendor believes to be true though he cannot prove it.⁴ A condition however is misleading and therefore bad which either requires the purchaser to assume what the vendor knows to be false or states that the state of the title is not accurately known when in fact it is known to the vendor.⁵ Conditions made in derogation of the ordinary right to make requisitions as to the title and to demand a good title may be so worded as to preclude inquiries into the vendor's title, or to require the purchaser to accept the vendor's title such as it is without inquiry.⁶ A condition of the former class, protecting the vendor from requisitions or the production of deeds, does not prevent the purchaser insisting on a defect of a title which appears *aliunde*. It remains open to him to take any objections to the title discoverable from other sources.⁷ As an instance of conditions of the second class, under which the purchaser is compelled to take such title as the vendor has, may be cited a case⁸ in which surplus lands bought from a Railway Company were sold with the stipulation that the purchaser should admit that everything had been done by the Company to enable them to sell

1 *In re Ford and Hill*, 10 Ch. D., 365.

2 Dart's Vendors and Purchasers, Chap. IV, on Particulars and Conditions: the matter is now to a certain extent regulated by statute, see 37 & 38 Vic., c. 78, sections 1 and 2; and Conveyancing Act, 1881, 44 & 45 Vic., c. 41, section 3.

3 Dart's Vendors and Purchasers, 6th ed., p. 163; see *Motivahoo v. Vinayak*, I. L. R., 12 Bom., p. 17; *Haji Mahomed v. Musaji*, I. L. R., 15 Bom., 657.

4 *In re Sandbach & Edmonston's Contract*, [1891] 1 Ch., 99.

5 *In re Banister*, 12 Ch. D., 131; see also *Nottingham Patent Brick, &c., Co. v. Butler*, 16 Q. B. D., 778; *Heywood v. Mallalieu*, 25 Ch. D., 357; *In re Marsh and Earl Granville*, 24 Ch. D., 11.

6 *Waddell v. Wolfe*, L. R., 9 Q. B., 515; *Best v. Hamand*, 12 Ch. D., p. 10.

7 *Mancharji v. Narayan*, 1 Bom. H. C., 77; *Smith v. Robinson*, 13 Ch. D., 148; *Jones v. Watts*, 43 Ch. D., 574; *In re Cox & Neve's Contracts*, [1891] 2 Ch., 109.

8 *Best v. Hamand*, 12 Ch. D., p. 10.

the surplus land, and that on the purchaser failing to comply with the terms of the agreement the deposit should be forfeited to the vendor. It turned out that the Company had omitted to do something necessary on their part to make a good title, and the purchaser brought an action to recover his deposit and damages, which action was dismissed. It was held that the plaintiff had in effect accepted the title for what it was worth and that, as he could not complain that the defendant had broken his contract, he must himself abide by it. At the same time, a condition that the purchaser shall take the property with such title as the vendor can give him does not mean that he can be compelled to complete if the vendor has no title of any sort and not even possession to offer.¹ The purchaser may be precluded from taking objection by the fact that he had clear notice of the state of the title before he entered into the contract for sale;² at least when, in the absence of express words, the purchaser has to rely on the implied covenant for title. But if the contract expressly provides that a good title shall be shown, the buyer may insist on it notwithstanding that he had previous notice of the defects in the title.³

Note 4. (d) The purchaser is the party to tender the conveyance for execution, and presumably it is to be prepared at his expense, according to English practice. But the expense of procuring the concurrence of other persons when necessary, and generally the costs of all matters essential to the validity of the deed as a perfect conveyance must be borne by the vendor.⁴ The execution by the vendor is to take place concurrently with the payment or tender by the buyer, and therefore neither can maintain an action against the other without proving that he was ready and willing to do his part. By announcing beforehand his refusal to execute a proper conveyance, the vendor dispenses with any tender on the part of the purchaser.⁵

Note 5. (e) Although the purchaser does not from the date of the contract acquire any interest in the property nor assume the whole risk, he is entitled to have the same care taken of the property by the vendor here

1 *Motivahoo v. Vinayak*, I. L. R., 12 Bom., 1.

2 *Mancharji v. Narayan*, 1 Bom. H. C., 77.

3 *In re Gloag & Miller's Contract*, 23 Ch. D., pp. 320, 327; *Pathoo Lal v. Radhika Doss*, 3 N. W. P., 106; *Ram Chunder v. Dwarkanath*, I. L. R., 16 Cal., p. 341.

4 *Dart's Vendors and Purchasers*, 6th ed., p. 570; *Specific Relief Act*, section 18 (b). The Stamp Act, section 29, provides that in the absence of agreement to the contrary the buyer shall pay for the stamp on a conveyance by way of sale.

5 *Essaj Adamji v. Bhimji*, 4 Bom. H. C., (O. C.), 125.

as under English law and this obligation of the vendor lasts until the property is delivered to the buyer. The vendor is sometimes said by English lawyers to be trustee for the purchaser, who is regarded in equity as the owner of the land.¹ And so here, although the buyer is said to have no interest in the land, the vendor is bound to take the same care of the property as is required of a trustee.² According to the English authorities the vendor is bound to take reasonable care of it until the purchaser takes or ought to take possession; and he is liable even for permissive waste.³ Where without the knowledge of either party a trespasser, taking advantage of the vendor's want of care, removed a quantity of soil, it was held that the purchaser on discovery of the fact could maintain an action for the breach of trust, notwithstanding that the contract had been completed and the conveyance executed.⁴ The documents of title are considered from many points of view as part of the property, and the vendor is under equal responsibilities with regard to them; see also section 55 (3).

Note 6. (f) In general the obligation to give the purchaser peaceable possession must be performed concurrently with the performance on the other side of the obligation to pay the price. So where after a contract of sale of goods, part of the property was seized by the Customs authorities in a manner apparently regular, it was held that the purchaser was not bound to pay the price and embark on a litigation with the Crown. If the seller, who was the sheriff, could not remove the hindrance to the purchaser's obtaining possession the latter was entitled to be relieved of his obligation to pay.⁵ Where it was part of the agreement that the purchaser should retain a portion of the purchase-money and therewith pay off certain incumbrances on the land and the conveyance had been executed on the faith of that undertaking, it was held that the purchaser could not obtain possession under the conveyance without showing that he had paid off the incumbrances.⁶ Where property has once been transferred by a conveyance duly executed, delivered, and registered, the purchaser's right is not divested by the fact of his returning the instrument owing to his inability to pay the purchase-money. It was

¹ Fry on Specific Performance, 3rd ed., p. 618.

² See Indian Trusts Act II of 1882, section 15.

³ Per Lord Selborne, C., Phillips v. Silvester, L. R., 8 Ch., 173; per Jessel, M. R., Lysaght v. Edward, 2 Ch. D., p. 510; Egmont & Smith, 6 Ch. D., 463.

⁴ Clarke v. Ramuz, [1891] 2 Q. B., 456.

⁵ Prévost v. La Compagnie de Fives-Lille, 10 App. Cas., 643.

⁶ Ikbal Begam v. Gobind Prasad, L. R., 3 All., 77.

accordingly held that the plaintiff, having bought the purchaser's right, title and interest at an execution-sale, could recover possession but only on condition of paying the purchase-money.¹

If by this clause it is meant that in the absence of express contract to the contrary the buyer is entitled to such possession as is with regard to the nature of the property possible, it follows that the purchaser of a house or houses, of agricultural or garden land, is alike entitled not merely to the possession of which property occupied by tenants admits, but to direct physical occupation. This can hardly be intended.² According to English law it seems that a purchaser, if he desires to have vacant possession, must stipulate for it, and that otherwise the obligation to deliver possession will be satisfied by placing the purchaser in the position of landlord with regard to tenants in occupation. Thus where an orchard was sold, being described as "now in the occupation of X," and the purchaser stipulated for possession on a certain day, it was held by Romilly, M.R., that he could not insist on personal occupation. Possession, it was observed, is a flexible term not necessarily meaning occupation.³ But when an estate, which was described "as now or late in the several occupations of H, R and others," was sold under conditions which provided that the purchaser should be "let into the receipt of the rents and profits," it was held on appeal that the purchaser could not be compelled to take the title without compensation on its appearing that part of the property was subject to leases for lives at low rents.⁴ In considering what sort of possession was intended by the contract of sale, regard may be had to the nature of the property, the purpose for which it was bought, and other circumstances;⁵ for whereas the purchaser of several houses or of agricultural land may presumably not have expected personal occupation, the buyer of a single house fit for residence would generally be buying with that view. When property was bought by a brewer to be used as a public house, and it turned out to have been let on lease to another brewer for a term of which seven years had yet to run, it was held that the purchaser was justified in repudiating the contract.⁶

1 *Umedmal v. Dava bin Dhondiba*, I. L. R., 2 Bom., 547; see *ante* p. 181.

2 See cases cited under section 54, paragraph 4.

3 *Lake v. Dean*, 28 Beav., 607; Sugden's Vendors and Purchasers, 14th ed., p. 8.

4 *Hughes v. Jones*, 3 De G. F. & J., 307; *Royal Bristol Building Society v. Bomanth*, 35 Ch. D., 390.

5 *Morgan v. The Government of Haiderabad*, I. L. R., 11 Mad., 419.

6 *Phillips v. Caldough*, L. R., 4 Q. B., 159.

Note 7. (g) When it is said that the seller is to pay all public charges and rent accrued due up to the date of the sale, apparently the date when the ownership passes to the buyer is intended, for in sub-section (5) (d) it is from that date that the buyer is declared bound to pay such charges and rent. In a case where the buyer pays off public charges or rent which have accrued due before the sale, he would under this clause be entitled to recover the amount so paid from the seller, the latter being a person 'bound by law to pay.'¹ It was however held in a case decided independently of the Act that such a suit could not be maintained, the vendor not having covenanted to recoup the vendee for such payment and no obligation under section 69 or 70 of the Contract Act being held to attach to the vendor.²

By this clause, as by section 7 of the Conveyancing Act, 1881,³ a covenant that the land is free from incumbrances is to be read into every conveyance not containing a provision on the subject. Thus it is the duty of the vendor selling property, not stated to be sold subject to incumbrances, to pay off any incumbrances which exist upon it, and if necessary to obtain a re-conveyance from the incumbrancer.⁴ Or if the purchase-money remains unpaid, the buyer may, under paragraph (5) (b) of this section, retain the amount of any incumbrances and pay it over to the persons entitled. This may be done, notwithstanding that the purchase-money has been assigned by the vendor to a third person without notice of any incumbrance.⁵

Note 8. This clause represents what is known in English books as the covenant for title, for which statutory provision has now been made in the following terms:—

Covenant for title.

"In a conveyance for valuable consideration other than a mortgage there shall be included the following covenant by the person who conveys and is expressed to convey as beneficial owner (namely): That notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value made, done, executed or omitted or knowingly suffered, the person who so conveys has, with the concurrence of every other person if any conveying by his direction, full power to convey the subject-matter expressed to be conveyed subject as if so expressed and in the manner in which it is expressed to be so conveyed."

¹ See section 69 of the Contract Act.

² *Dost Muhammed v. Sanjad*, I. L. R., 6 All., 67.

³ 44 & 45 Vic., c. 41, section 7; see *Basaraddi v. Enajaddi*, I. L. R., 25 Cal., 298.

⁴ See Specific Relief Act I of 1877, section 18 (c) and see *post* section 57.

⁵ *Dart's Vendors and Purchasers*, 6th ed., p. 666.

It will be seen that this covenant is far more restricted than that which the clause of the Act imposes on the vendor. Under the statute the vendor covenants against the acts of himself, his ancestors, or testators.¹ Under the clause he warrants absolutely the title, with which he professes to deal, and his power to deal with it. If it turns out that his title was different from what it was supposed to be, *e.g.*, that the land was held on a less favourable tenure than was supposed, the purchaser can sue for compensation in damages. The purchaser should immediately on discovering the defect of title bring his action on the covenant, for on the execution of the conveyance the covenant for title if broken at all, is broken; and for the purpose of limitation time begins to run from that date in favour of the vendor.²

This clause should be read with clause (b) of section 25 of the Specific Relief Act which requires the vendor seeking specific performance to give a title free from reasonable doubt. In a case in which the contract sought to be enforced ended with these words, "The time in respect of this bargain is fixed at two months. Within this time we are duly to have everything cleared," it was held that the defendant was not bound to take such title as the plaintiff could give, but was entitled to a title free from reasonable doubt.³ On the other hand, where the purchaser sought for specific performance and it appeared that he had insisted on an absolute warranty of title, the suit was dismissed on the ground that he had insisted on having that which he had no right to have.⁴ The Judicial Committee were not even prepared to hold that the purchaser was entitled to a covenant limited to the acts of the heirs and assigns.⁵ In this case no reference is made to the statutory provisions on the subject.

In the absence of this implied covenant for title, which may be excluded by special contract, and in the absence of fraud, the better opinion according to the English cases seems to be that the purchaser is not entitled to relief on account of defects in the title after he has taken a conveyance and paid the purchase-money in full. The purchaser cannot on discovering the defect say to the vendor:—"Take

Rights of purchaser in absence of covenant.

1 See *David v. Sabin*, [1893] 1 Ch., 523; *Howard v. Maitland*, 11 Q. B. D., 695.

2 *Raju Balu v. Krishnarav*, I. L. R., 2 Bom., 273; *Hari Tiwari v. Raghunath*, I. L. R., 11 All., p. 30; if the contract is contained in a registered instrument the six years' rule applies, *Krishnan v. Kannan*, I. L. R., 21 Mad., 8.

3 *Haji Mahomed v. Musaji*, I. L. R., 15 Bom., 657.

4 *Bindeshri v. Mahant Jairam*, I. L. R., 9 All., 705.

5 As to such covenant see *Ghulam v. Imdad*, I. L. R., 4 All., 357.

"it back for what it is worth and give me back my money."¹ Where the executors of one L, joined with the mortgagee of certain property in conveying it to the plaintiff, and the real owner of the equity of redemption being the wife of L recovered the value of it from the plaintiff in a suit brought against him, it was held that he had no remedy against the executors, they not having been guilty of any fraud and not having given covenants for title.² So when the defendant, honestly believing his property to contain three acres, described it as such and sold it to the plaintiff who after conveyance measured it and found it to contain 2a. 1r. 12p. only, it was held that the plaintiff could not, in the absence of express stipulation, recover compensation.³ But where there is in the contract of sale an express stipulation for compensation in the case of any error or omission in the particulars, it has been held that the benefit of it is not lost by the fact of the purchaser taking the conveyance.⁴

The law as laid down in *Clare v. Lamb*⁵ has been adopted in this country.⁶ But where the sale is *in invitum* as regards the owner of the thing sold, and made under colour of legal process, inasmuch as the purchaser at such sales does not enjoy the means of investigating the title, which the purchaser at a private sale has, the rule does not apply.⁷ According to section 313 of the Civil Procedure Code, such a purchaser may apply to have the sale set aside only on the ground that the judgment-debtor had no saleable interest in the property sold; and it has been ruled that he is entitled to the benefit of the provisions of that section only if he purchased the valueless property innocently and ignorantly.⁸ And the Privy Council has held that a person who knowingly purchases property in an execution-sale subject to a contingency which may destroy the interest sold, cannot be relieved from his bargain because the contingency actually happens.⁹

1 *Soper v. Arnold*, 37 Ch. D., p. 101, affirmed, 14 App. Cas., 429; *Brownlie v. Campbell*, 5 App. Cas., p. 937.

2 *Clare v. Lamb*, L. R., 10 C. P., 334.

3 *Jolliffe v. Baker*, 11 Q. B. D., 255, so in *Clayton v. Leech*, 41 Ch. D., 103, where the defect was in the duration of the lease.

4 *Palmer v. Johnson*, 13 Q. B. D., 351, overruling the decision of *Malins, V.O.*, in *Manson v. Thacker*, 7 Ch. D., 620, see *Clayton v. Leech*, 41 Ch. D., 103.

5 L. R., 10 C. P., 334.

6 *Dorab Ally v. Khajah*, 1 L. R., 3 Cal., 806; *Ramasawmy v. Valayuda*, 4 Mad. H. C., p. 269; *Gajapathi v. Alagia*, 1 L. R., 9 Mad., 89.

7 *Dorab Ally v. Khajah*, 1 L. R., 3 Cal., 806.

8 *Mahabir Prasad v. Dhuman Das*, 1 L. R., 3 All., 527; *Eurga v. Govinda*, 1 L. R., 10 Cal., 368.

9 *Ram Tuhul Singh v. Bissessar*, 15 Beng. L. R., 248.

By a contract to the contrary the seller may be relieved from the obligation imposed by this clause. On the principle *Covenant for title excluded.* *expressum facit cessare tacitum,*" from the insertion in express terms of a limited covenant it may be inferred that it was the intention of the parties to exclude the larger statutory covenant.¹

The right to insist on the covenant for title whether arising from express contract or otherwise, may be lost by waiver. *Waiver of covenant.* In cases of waiver a distinction is made between those in which the defect is curable and those in which it is in its nature incurable. A vendee takes possession of property knowing that it is subject to a mortgage; there is no waiver of his right to have the mortgage paid off. On the other hand, if the defect consists in the fact that a third person possesses some right, e.g., an easement over the property from which the vendor cannot obtain a release, the fact that the purchaser takes possession of the property with knowledge of such right will be evidence that he has waived the objection he might otherwise have taken. A further distinction, having reference to the circumstances under which possession is taken, may be noted. Where possession is taken, not in pursuance of any special provision in the contract, but after the purchaser has had an opportunity of discovering any defects in the title, there is *prima facie* a waiver of any objections relating to such defects. But where possession is taken in accordance with an arrangement to that effect between the parties, there is generally no waiver. The buyer is supposed, notwithstanding his possession, to reserve his right to require a good title.²

The fact that a defect of title appears on the face of the conveyance or is otherwise known to the purchaser is no reason for denying him the benefit of the covenant.³ It is to be noted that there is no provision for a covenant for quiet enjoyment as there is in section 108 (c) for the benefit of the lessee.

Note 9. Similarly in England trustees or other persons holding a fiduciary position covenant only that they have themselves done no act to encumber the property or to prevent them from granting it. As between *Proviso in case of trustees selling.*

1 *Ohandiere Gold Mining Co. v. Desbarats*, L. R., 5 P. C., 277.

2 *In re Gloag & Miller's Contract*, 23 Ch. D., 320; Fry on Specific Performance, 3rd ed., p. 600; Dart's Vendors and Purchasers, 6th ed., p. 499; see *Ghousiah v. Rustumjah*, L. R., 13 Mad., 158.

3 *Page v. Midland Railway Co.*, [1894] 1 Ch., 11.

a trustee and a beneficiary, a trustee exercising a power of sale "may insert such reasonable stipulation either as to title or evidence of title "or otherwise on any conditions of sale or contract for sale as he thinks "fit."¹

Note 10. The benefit of the implied covenant for title of either kind runs with the land and enures to the benefit of future purchasers.— See note to section 40, and compare section 65, last paragraph, and section 108 (A) (c).

Note 11. The rule and the provisos here stated are borrowed from the English law. The first proviso is now embodied in the statute known as the Vendors and Purchasers Act, 1874,² and the second is in accordance with recognised practice.³ The obligation being a personal one, imposed upon the seller in the one case and on the buyer in the other, it would seem that he would not be discharged by the mere fact of his ceasing to be interested in the land. The obligation is not restricted, as it is in the Conveyancing Act, to "each individual possessor or person as long only as he has possession "or control" of the documents, nor is it extended to "every person "having possession or control of the documents from time to time."

The production of the documents under the implied covenant to produce and the furnishing of copies is, it should be observed, to be at the expense of the purchaser.⁴ Counterpart leases and documents of the like kind, such as *kabulayats*, would come within this clause and pass to the purchaser. It has been held that village account books, although they cannot be called title-deeds, may also be claimed by the purchaser as necessary for the enjoyment of the property and accessory to it.⁵

Note 12. It is from the date of the conveyance and not from the date of the contract, that the buyer's right to the profits accrues. From the time when the ownership passes, the seller, if he retains possession, must account to the purchaser for the rents and profits of the land. And similarly if the purchaser withholds the price he must pay interest upon it to the vendor. Thus it is said that the enjoyment of the land and that of the purchase-money are mutually exclusive.⁶ In the case of a vendor

*Right of seller (a) to
rents and profits;*

1 Indian Trusts Act II of 1882, section 38.

2 37 & 38 Vic., c. 78; and see Conveyancing Act, 1881. 44 & 45 Vic., c. 41, section 9.

3 Dart's Vendors and Purchasers, 6th ed., p. 627, &c.

4 As to the English law on the subject see the statutes above cited.

5 *Shri Bhavani Devi v. Devrao*, I. L. R., 11 Bom., 185, and see section 8.

6 *Fry on Specific Performance*, 3rd ed., p. 620; see *Greenwood v. Turner*, [1891] 2 Ch., 144.

retaining the property in his personal occupation and thus deriving no rents and profits from it in the ordinary sense of the terms, the sum payable by him to the purchaser will be computed as an occupation-rent. In fixing the amount just allowance should be made for such outgoings as taxes which the vendor has had to pay, and he will not ordinarily be liable for sums which he might have received but for his wilful default.¹

While the vendor is entitled to the rents and profits up to the date of the conveyance or other transfer of the property, he may not, it is apprehended, "take crops in an immature state or otherwise than in due "course of husbandry."²

By virtue of section 36 rent is deemed to accrue from day to day, and is apportionable accordingly between the vendor and the purchaser.³

Note 13. In this clause provision is made for the vendor's lien for unpaid purchase-money—an equitable lien as it is called in the books, in contradistinction to the common law or possessory lien of the unpaid vendor of goods.⁴ Generally the vendor is not bound to deliver possession except on payment of the purchase-money.⁵ And, on the other hand, the purchaser is liable for interest on unpaid purchase-money from the date of his taking possession.⁶ This lien arises independently of possession, and without any stipulation for it on the vendor's part, whenever there is a valid contract for sale and the time for completing that contract has arrived and the purchase-money is not duly paid.⁷

There are three points to be considered with regard to the vendor's lien. *First*, against whom is it available? According to the section the vendor has a charge on the land in the hands of the buyer only, but it can

*Against whom
does lien avail?*

1 *Sherwin v. Shakspear*, 5 De G. M. & G., 517; *Metropolitan Railway Co. v. Defries*, 2 Q. B. D., 189; and see *Dart's Vendors and Purchasers*, 6th ed., p. 709.

2 See section 55 (6) (a), *post* note 19; and *Dart's Vendors and Purchasers*, 6th ed., pp. 285, 733.

3 See *ante* p. 85.

4 See *Yellappa bin Basappa v. Mantappa*, 3 Bom. H. C., (A. C.), 102; *Hari Ram v. Denaput Singh*, I. L. R., 9 Cal., 167; *Umedmal v. Dava bin Dhondiba*, I. L. R., 2 Bom., 547; *Trimalrav v. Municipal Commissioners of Hubli*, I. L. R., 3 Bom., 172.

5 See *ante* p. 155 and *Umedmal v. Dava bin Dhondiba*, I. L. R., 2 Bom., 547.

6 *Ballard v. Shutt*, 15 Ch. D., 122.

7 *Kettlewell v. Watson*, 26 Ch. D., 507; *Kesri v. Ganga Prasad*, I. L. R., 4 All., 163; *Virchand v. Kumaji*, I. L. R., 18 Bom., 49.

hardly have been intended to prevent the charge from being made effectual against other persons not being purchasers without notice. If, as would seem to be the case, the second clause of section 40 covers the case of the obligation in favour of the vendor, it is clear that it may be enforced against a transferee with notice or a gratuitous transferee. Only when the property has passed into the hands of a purchaser for value without notice, is it free from the vendor's lien according to the English law. The lien may therefore be enforced against volunteers and against sub-purchasers or mortgagees having notice of the lien, against creditors of the purchaser and against persons to whom he may have contracted to sell the property. In the last mentioned, as in any other case where the interests of the conflicting parties are only equitable, the Court has to consider "the nature and condition of the respective interests, the circumstances and manner of their acquisition, and the whole conduct of each party." If in all other respects the merits of the two parties are equal, priority in time becomes a ground of preference.¹ In *Rice v. Rice*² the competition was between the vendor asserting his lien for unpaid purchase-money and an equitable mortgagee holding the title-deeds. Preference was given to the latter, who was found to be guilty of no negligence, on the strength of his possession of the title-deeds against the vendor who had surrendered them and had also given a receipt for the purchase-money. Section 3, paragraph 6, declares what amounts to notice.³ Failure on the part of a mortgagee to obtain the title-deeds does not necessarily entail upon him the consequences of notice. Unless it is attributable to fraud, misrepresentation, or gross neglect, he is not held to have had notice, and consequently holds his property free from the lien.—(See section 78.)

Secondly, as to the remedy; the lien is made effectual by means of

What is remedy? a suit for sale, for which provision is made in section 100. Where a vendor whose purchase-money was

payable by instalments, some of which were not yet due, sued for specific performance and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due.⁴ The suit must be brought within three years from the time fixed for completing the sale or, where the title is accepted after the time fixed for completion, from the date of the acceptance of the title.

¹ See section 48.

² *2 Drew, 73*; and see *Mackreth v. Symmons*, 1 W. & T. L. C., 6th ed., p. 355; *Bickerton v. Walker*, 31 Ch. D., 153, and *post* note to section 137.

³ See *ante* p. 11 and section 78.

⁴ *Nives v. Nives*, 15 Ch. D., 649.

Thirdly, when is the lien excluded or lost? It may be excluded either by express agreement or by acts on the vendor's part indicating an intention to abandon it.

When lien excluded or lost.

Numerous cases have been decided on the question whether the abandonment of the lien should be implied from circumstances.¹ It seems that inference of the intention to abandon must be clear and manifest, and that the taking of a bond, a promissory note or a covenant, will not raise it, even if the covenant is to pay at some future date. It cannot be assumed that the vendor by taking one security intends to relinquish the other;² but it may be shown that the security was taken in substitution for the purchase-money, and was in fact the thing bargained for. Thus where the vendor of property to a company agreed to have the purchase-money paid from the proceeds of the sale of shares and from the capital of the company, it was held that such an agreement was inconsistent with the existence of a lien on the property, and that the vendor intended to rely exclusively on the funds of the company.³ As between the unpaid vendor and sub-purchasers who have acquired an equitable interest only, the former may by his conduct in inducing the latter to believe that his vendee has power to deal with the estate as absolute owner, free from the lien for purchase-money, preclude himself from insisting on the lien.⁴ In such cases there is a conflict between equitable interests, and while the earlier will prevail, other things being equal, the latter may be preferred in view of the conduct of the parties and other circumstances of the case.⁵

It has been said that an unpaid vendor is entitled to proceed as a mortgagee.⁶ He cannot however like a mortgagee enforce the lien and any collateral securities he may have at the same time.⁷

For the corresponding rights of the vendee, see section 55 (6) (b).⁸

Note 14. If, for instance, the purchaser of an estate knows and the vendor does not know that a prior tenant-for-life has died, the former is bound to disclose the fact to the vendor. Where an old woman of eighty-eight, being in distress and without legal assistance, was induced to

Buyer's duty (a) to disclose facts relating to seller's interest;

1 *Mackroth v. Symmons*, 1 W. & T. L. C., 6th ed., p. 355; see also *Smith v. Evans*, 28 Beav., 59; *Dart's Vendors and Purchasers*, 6th ed., pp. 833 *et seq.*

2 *Winter v. Anson*, 3 Russ., 493; *Grant v. Mills*, 2 Ves. & B., 306.

3 *In re Brentwood Brick Co.*, 4 Ch. D., 562; see also *Contract Act*, section 95.

4 *Kettlewell v. Watson*, 26 Ch. D., 501.

5 See *note* to section 137 *ad fin.*

6 *Hope v. Booth*, 1 B. & Ad., 498; and see section 100.

7 *Nairn v. Prowse*, 6 Ves., 752; *Barker v. Smark*, 3 Beav., 64.

8 See *note* 19.

sell her property at one-fourth of its value under the impression that she could not make out a good title whereas the purchaser knew that she could, and concealed the fact from her, the Master of the Rolls said¹ :—

"If a person comes to me and offers to sell to me a property which I knew to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title which I knew that he can, and I conceal that knowledge from him, is not that a *suppressio veri*, which is one of the elements which constitute a fraud?"

On the same principle if the purchaser of a policy of life-insurance knows that the life has died, he is bound to disclose the fact.² And it is provided that the omission to make such disclosures constitutes fraud; the contract affected by it is accordingly voidable.³ In regard to matters touching the nature or extent of the seller's interest an obligation is cast as well on the buyer as on the seller, but in regard to the qualities of the property sold it is otherwise. The vendor must disclose latent defects, but the purchaser need not mention latent advantages, *e.g.*, the existence of a mine on the property unknown to the vendor.⁴

Lord Selborne in a recent case summarised the duties of an ordinary purchaser, for which provision is made in this clause, as follows :—

"Every such purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and (of course) to abstain from all deceit, whether by suppression of truth, or by suggestion of falsehood. But inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessary or naturally and probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is a sufficient ground for setting aside a contract, if the vendor was, in fact, so misled. A man is presumed to intend the necessary or natural consequences of his own words and acts; and the *evidentia rei* would therefore be sufficient without other proofs of intention. If the vendor was not, in fact, misled, the contract could not be set aside; because a '*dolus*' which neither induced nor materially affected the contract is not enough."⁵

1 *Summers v. Griffiths*, 35 Beav., p. 32; and see *Sadashiv v. Dhakubai*, I. L. R., 5 Bom., 450.

2 *Dart's Vendors and Purchasers*, 6th ed., p. 119.

3 See section 55 (6) (b), and see *ante* p. 148.

4 *Dart's Vendors and Purchasers*, 6th ed., p. 119; *Haji Essa v. Dayabhai*, I. L. R., 20 Bom., 532.

5 *Coaks v. Boswell*, 11 App. Cas., 235.

Note 15. If the purchaser, whether before or after the execution of the conveyance, discovers an incumbrance on the property which he has not himself undertaken to discharge, he should satisfy the incumbrancer out of the unpaid purchase-money; or prior to conveyance he may apply to the Court for the discharge of the incumbrance under section 57. A purchaser having had notice prior to payment of the purchase-money of incumbrances or charges as to which notice is necessary to make him liable, will not escape liability because he had no notice at the date of the conveyance.¹ This right of the purchaser to apply the money in discharge of incumbrances cannot be affected by an assignment of the purchase-money to a third person.²

Note 16. While the buyer is entitled to have due care taken of the property, it would seem, that he does not bear the risk of accidental loss until the ownership has passed to him. It being declared in section 54 that the contract of sale does not of itself create any interest in the property, it naturally follows that the buyer does not from the date of the contract assume the risk of accidental destruction, for it would be wholly unreasonable that a man, who is said to have no interest in the property, should be held to have assumed that risk concerning it. The obligation of the seller to take due care of the property between the dates of the contract and of the conveyance is required to protect the rights of the buyer under his contract, including the right of lien for prepaid purchase-money. It is an obligation which is not inconsistent with the position that the risk remains with the seller until the ownership has passed to the buyer. That position being assumed the question arises whether any loss or disadvantage which occurs to the property in the interval between the date of the contract and of the conveyance may be taken into account in giving a decree for specific performance. If A contracts to sell a house to B and the day after the contract is made the house is destroyed by a cyclone, the contract does not become void on the ground of impossibility (section 13, Specific Relief Act). But, if in such a case it can be said that the seller is unable to perform the whole of his part of the contract, then the buyer may claim compensation under section 14, or resist the demand for specific performance under section 15. Illustration (a) to section 13 is founded on the English law which is inconsistent with the present Act. According to

¹ *In re Jackson and Oakshott*, 14 Ch. D., 851.

² *Dart's Vendors and Purchasers*, 6th ed., p. 666, citing *Lacey v. Ingle*, 2 Ph., 413.

English law the buyer becomes from the date of the contract the equitable owner of the estate,¹ and he may be compelled to pay the consideration although before a conveyance is executed, the estate itself may be destroyed. On the other hand he is entitled to any benefit which may accrue to the estate in the interval. Any advantage or loss resulting from events happening after the contract is signed is taken or borne by the purchaser. This proposition is expressed in the maxim *Nam et commodum ejus esse debet cujus est periculum* (see however note 18).

Note 17. Wherever the vendor "is personally subject to liabilities " either in respect of the estate or for the performance of which the estate stands as a security, the purchaser taking the estate must undertake the "liabilities and covenant to indemnify the vendor against them."² Thus the purchaser of a mortgaged estate becomes liable to pay the mortgage-money and interest, the purchaser of a reversion becomes liable to pay the succession duty payable under English law, the purchaser of lease-holds to pay the rent and perform the covenants contained in the lease. In all such cases, however, where the vendor has originally undertaken a personal liability he remains liable notwithstanding the transfer and must rely on the indemnity which the purchaser is bound to afford him.³ Garth, C.J., has observed with reference to this clause :—

"It would seem to mean nothing more than this, that the transferee as between "him and the transferor shall take upon himself the burden of any charge which may "exist on the property. It would leave the law in the generality of cases as it was "before the Act passed. The transferee would, as a matter of course, have taken "the property subject to the charge. The only burden which he would not have "taken upon himself would be the personal liability (if any) of the transferor, and it "is possible that section 55 may effect some alteration in the law in that respect."⁴

The case from which the above passage is cited arose under section 24 of the Stamp Act,⁵ and the decision was to the effect that where property is sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part

1 See *ante* p. 143.

2 Dart's Vendors and Purchasers, 6th ed., p. 628; and compare *Bhyrub Chunder v. Sondamini*, 1 L. R., 2 Cal., 141; see also *ante* section 55 (1) (g), and the cases cited in note 7, *supra*. As to the power of the Court to make provision for the discharge of incumbrances on sale and to declare the sale to be free of incumbrances, see section 57.

3 Compare *post* section 108 (j).

4 Reference by the Board of Revenue, 1 L. R., 10 Cal., 92.

5 Act I of 1879.

of the consideration-money for the purchase. This decision agrees with a previous ruling of the High Court at Madras,¹ but is opposed to one of the High Court of Bombay.²

Note 18. When the buyer has become owner of the property, it hardly needs to be stated that he is entitled to any improvements on it or any profit derived from it. Presumably the clause means that he is not so entitled before the date when the ownership passes, and that accordingly up to that date the seller is the person entitled. This is clearly the case with regard to rents and profits, for sub-section (4) (a) declares the seller's right in express terms. As between the buyer and tenants of the land, the former cannot be entitled to recover rents, accruing due before the conveyance, and section 50 protects tenants who in ignorance of the transfer have paid rent to the seller even after the date when he has ceased to be owner. With regard to improvements between the date of the contract and that of the conveyance there is some difficulty. It is conceivable that in the interim benefit may accrue to the estate, *e.g.*, from an extraneous system of irrigation or from the approach of a railway, or again, in the case of a reversionary interest, that the value of it may have been increased by deaths occurring. Except by an increase of the purchase-money which *ex hypothesi* has already been agreed upon, the seller cannot obtain any advantage therefrom. Since there is of course no provision for such readjustment of the price, it would seem that although the seller bears the risk he cannot claim the benefit of improvements arising before the ownership passes from him, and that the maxim '*Nam et commodum ejus esse debet cujus periculum est*' does not hold good as it does in England.

Note 19. If the sale goes off for any cause other than the default of the purchaser, he has a lien on the estate for the purchase-money paid by him in advance, and this, notwithstanding that he may have taken distinct security for the money advanced.³ To the extent to which he has paid his purchase-money he is considered in the English Courts to be in equity the owner of the estate. This right of the purchaser is generally analogous to the vendor's lien for unpaid purchase-money. In a case where the plaintiff had paid most of the purchase-money of an

(b) to lien for purchase-money paid in advance.

1 Reference under Stamp Act, 1879, I. L. R., 5 Mad., 18.

2 Nagindas Jeychand v. Halalkore Nathwa, I. L. R., 5 Bom., 470.

3 Dinn v. Grant, 5 De G. & Sm., 451; Torrance v. Bolton, L. R., 14 Eq., 124; s.c., L. R., 8 Ch., 118; Weston v. Savage, 10 Ch. D., 736; Sadashiv v. Dhakubai, I. L. R., 5 Bom., 450.

estate in New South Wales, which he then discovered to be subject to certain Government reservations and conditions for which the proper compensation could not be ascertained, Turner and Knight-Bruce, L. J. J., in deciding that he was not bound to complete the purchase, held that he was entitled to the return of his purchase-money with interest at 4 per cent., and to a lien on the estate for the amount.¹ This lien the purchaser does not lose by taking additional security, and it is enforceable against subsequent mortgagees with notice of the payment.² If the purchaser having the lien contracts for the sale of the estate to a third person and receives the price, and then the first contract goes off, such third person has a lien upon the interest which the first purchaser possesses.³

The distinction between the two cases put in this clause is not very clear. For the latter, where a suit for specific performance has been dismissed on the ground of the vendor's imperfect title, provision is also made in the Specific Relief Act.⁴ Similarly according to English law the purchaser has a lien for his deposit, for all instalments of the purchase-money, for all sums paid under the contract as interest on the purchase-money and for interest on them, and for the costs of an unsuccessful action brought by the vendor against him.⁵

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

Commentary.

The rule is thus expressed by Dart:—

"If two estates, X and Y, are subject to a common charge, and estate X is sold to A, A will, as against the vendor and his representatives, have a *prima facie* equity, in the absence of express agreement and whether or not he had notice of the charge, to throw it primarily on estate Y in exoneration of estate X."⁶

1 Westmacott v. Robins, 4 De G. F. & J., 390.

2 Wythes v. Lee, 3 Drew., 396; s.c., 25 L. J., Ch., 177; Rose v. Watson, 10 H. L. C., 672; and see section 40, paragraph (2).

3 Aberaman Iron Works v. Wickens, L. R., 4 Ch., p. 107.

4 Act I of 1877, section 18 (d).

5 Fry on Specific Performance, 3rd ed., p. 650.

6 Dart's Vendors and Purchasers, 6th ed., p. 1035; Barnes v. Racster, 1 Y. & C. C., p. 401; Flint v. Howard, [1893] 2 Ch., 54.

It may be presumed that the buyer's right under the section will similarly arise, whether or not he has notice of the charge and in that respect the right of marshalling here provided will differ from that provided for second mortgagees under section 81. According to the English cases, if in the case stated in the above passage cited from Dart, a third person afterwards buys estate Y with notice of the charge and of the prior sale of estate X to A, he will take subject to A's equity, and the entire charge will rest primarily on estate Y. The right declared by this section has been enforced in favour of purchasers without notice of the common charge in cases decided before the Act came into force.¹

Discharge of Incumbrance on Sale.

57. (a) Where immovable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,

Provision by Court for incumbrances, and sale freed therefrom.

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation

¹ Bishonath v. Kisto Mohun, 7 W. R., 483; Rodh Mal v. Ram Harakh, I. L. R., 7 All., 711; see section 81 and note,

of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded, in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale and give directions for the retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

Commentary.

This section, exclusive of the last two clauses, is taken almost word

for word from the Conveyancing Act, 1881, section 5.¹

Incumbrance.

The word 'incumbrance,' not being specially defined in the present Act, may be supposed to bear the meaning given to it in the statute whence the section is derived. In section 2 of that

¹ 44 & 45 Vic., c. 41; and see Dart's Vendors and Purchasers, 6th ed., pp. 697, 1312, 1316.

statute, 'incumbrance' is said to include a mortgage in fee or for a less estate, and a trust for securing money and a lien, and a charge of a portion, annuity or other capital or annual sum. It is clear from the language of section 101 of this Act that the word incumbrance is intended to include a charge.

The power which under this section the Court may exercise in the case of any sale is intended to facilitate the alienation of incumbered estates by relieving the land from the incumbrance and substituting for the land another form of security. An application may be made by any party to the sale, i.e., by the vendor or purchaser in an ordinary sale out of Court. A question may arise as to who are parties

Party to the sale.

to a sale under a decree, whether all persons parties to the suit and so bound by the sale would not be parties so as to be entitled to apply. A person who, though interested in the property, e.g., as mortgagee is not bound by the sale, is clearly in no sense a party to it.

The fact that the mortgage contains an agreement that the money shall remain for a fixed period will probably be regarded
'Special reasons.' as a special reason for requiring a large amount beyond the margin of 10 per cent., so as to secure the mortgagee his full interest during the fixed period, or give him the proper amount of damages on paying him off. If the mortgage is of the nature described in section 78, the possibility of further advances might also be taken into account.

In cases decided under the statute it has been ruled that the Court should follow the words of the statute strictly and,
Illustration. after directing payment into Court of the purchase-money and setting apart a sufficient amount to meet the claims of the incumbrancer, proceed to declare that thereupon any person interested should be at liberty to apply in chambers for a declaration that the land is free from the incumbrance.¹ In a recent case a Railway Company had undertaken to sell some superfluous land 'free from incumbrances,' the contract however providing that if the purchaser should decline to waive any valid objection to the title, the Company might rescind the contract. The abstract of title showed that the land was subject to a perpetual rent-charge, the sum required to pay off which would greatly exceed the purchase-money. On these facts Pearson, J. held that the Company was entitled to rescind the contract: and after observing that the statute was permissive in its language, said:—

"The first question is whether section 5 applies at all to a case of this kind, and I am rather disposed to think it does not. I am not asked by the vendor to make

¹ *Dicken v. Dicken*, 30 W. R., (London), p. 887, and Weekly Notes (1882), p. 113. See also *Patching v. Bull*, 30 W. R., (London), p. 214, and 46 L. T., 227.

"use of the power conferred by this section; but I am asked by the purchaser to say that the vendors ought to apply to the Court to make use of that power when the vendors do not wish that the Court should do so. I think that when it is said that the Court may 'direct or allow payment into Court,' the word 'direct' applies to a sale by the Court and the word 'allow' to a sale out of Court. This rent-charge is secured on the land by an Act of Parliament, and I have got great difficulty in saying that section 5 of the Conveyancing Act applies at all to such a case so as to enable me to take away from the persons who are entitled to the rent-charge, that which the other Act has given them, without their consent and indeed without any notice to them. I should hesitate a long time before I could come to such a conclusion. But supposing that upon the application of the vendors I could declare the land free from the rent-charge, what I have to consider is whether, where the vendor makes no such application I ought to insist on their doing so, when they would have to pay into Court a sum very considerably in excess of the purchase-money."¹

The section was applied by the same learned Judge in a case which arose out of the following circumstances. A executed a mortgage to B, the deed containing a clause which gave the mortgagee an option to purchase in case the debt was not paid on a day named. Before the debt fell due, A became bankrupt and a trustee was appointed who proceeded to sell the mortgaged property to the plaintiffs. It was made one of the terms of the agreement for sale that a part of the purchase-money should be deposited in Court to provide against the mortgage, but the money was not so deposited. Pending proceedings on the part of the trustee to set aside the mortgage on the ground of fraudulent preference, an order was made on the application of the plaintiffs that an amount sufficient to meet the incumbrance and interest thereon should be paid into Court, and that the mortgaged property should thereupon vest in the plaintiffs. The order was made on notice given to the trustee and to B.²

Although the object of the section is not to be defeated by the circumstance that the incumbrancer cannot be found,
Notice. the Court will of course in ordinary cases refuse to make an order without notice being given to him, so that he may have an opportunity of proving what is due to him and what amount of security he may properly require in substitution for the land. No provision is made for the service of notice under this section; for the provision of section 102, being restricted to notice served under Chapter IV., can have no application.

¹ *In re Great Northern Railway Company & Sanderson*, 25 Ch. D., 713.

² *Milford Haven, &c., Co. v. Mowatt*, 28 Ch. D., 402.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

- [1] **58.** (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

"Mortgage,"
"mortgagor," and
"mortgagee"
defined.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

- [2] (b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

Simple mortgage.

- [3] (c) Where the mortgagor ostensibly sells the mortgaged property—

Mortgage by conditional sale.
on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void; or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the [4]

Usufructuary mortgage. mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the [5]

English mortgage. mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

Commentary.

Note 1. (a) Like any other security a mortgage presupposes the existence of a debt, the personal liability for which is not affected by the mortgage except in the case where the security is taken in substitution or accord and satisfaction. The interest conveyed to the creditor is a real right available to him as well against the owner as against subsequent purchasers from him. In the English mortgage and the mortgage by conditional sale, it is the ownership that is transferred, the transfer being accompanied by a condition. In the usufructuary mortgage it is the right of possession and enjoyment of the usufruct that is transferred.¹ The creditor, to whom a right of entry on specific property is given by way of security, has an interest in the property conveyed to him. It is not a mere license which as has been said, "passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful."² In the simple

¹ See *Indar Sen v. Naubat Singh*, I. L. R., 7 All., 553; *Motiram v. Vimal*, I. L. R., 13 Bom., p. 100.

² *Thomas v. Sorrell*, Vaughan, 351.

mortgage the interest transferred consists in the right to have the property sold. "The right of sale is one of the component rights of ownership and may be parted with separately in order thus to add security to a personal obligation. When so parted with it is a right of pledge which may be defined as a right *in rem* realizable by sale given to a creditor by way of security accessory to a right *in personam*."¹ The cases, in which the question is raised whether an interest has been transferred so as to make the instrument a mortgage are dealt with in note 2 to this section.

In order that an instrument should operate as a mortgage no special form of words is required, but it must appear that an interest in specific immoveable property was transferred and that a security was intended. The following cases show how a document may fail to have effect as a mortgage or charge, either because the property is not specifically described² or because operative words are wanting. Where by an instrument a sum of Rs. 100 was charged on land described as that "granted to the executant by Government in perpetuity," it was held that the property was sufficiently identified.³ On the other hand where the words used were:—"We hypothecate as security for the amount our property with all the right and interests," and the debtors simply described themselves as residents in a certain place, and not as owners of any given property to which the words could be referred, it was held that they were too vague to constitute a mortgage.⁴ Similarly where a bond, after stating that the obligors promised to pay the amount due by instalments, proceeded:—"If it is not so paid we will pay it with the whole of our property," the words were held insufficient to create a charge against a purchaser who had taken in good faith for value.⁵ In a recent Allahabad case the following words in a registered instrument were held sufficient to create a charge:—"To secure this money I pledge voluntarily and willingly my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by

1 Holland on Jurisprudence, p. 152, cited in *Gopal v. Parsotam*, I. L. R., 5 All., 121, and *Sheoratan v. Nahipal*, I. L. R., 7 All., 258; see *Shridhar v. Atmaram*, I. L. R., 7 Bom., p. 458.

2 See also as to this requirement, Indian Registration Act—Act III of 1877—sections 21, 22, and *Najibulla v. Nursir Mistri*, I. L. R., 7 Cal., p. 198.

3 *Kanhia Lal v. Mulampan*, I. L. R., 5 All., 11; distinguishing *Deojit v. Pitambar*, I. L. R., 1 All., 275; see *Shadi Lal v. Thakur Das*, I. L. R., 12 All., 175.

4 *Deojit v. Pitambar*, *supra*.

5 *Bheri Dorayya v. Maddipatu*, I. L. R., 3 Mad., 35; see *Collector of Etawah v. Beti Maharaj*, I. L. R., 14 All., 162.

"the said banker, that all should be available to the said banker."¹ The case cited below² was distinguished, and reference was made to *Tadman v. D'Epineuil*³ in which Fry, J., held that an instrument charging in a creditor's favour all the present and future personalty of the person signing it, operated to charge all his personal property at the date of the instrument, but not after-acquired property. The case so far as it decides that an assignment of future-acquired property is invalid on the ground of vagueness, has since been over-ruled by a recent decision in the House of Lords. In *Tailby v. Official Receiver*,⁴ the plaintiff sued as trustee in bankruptcy of one who had assigned, by way of security, to a person whom the defendant represented, *inter alia*, "all the book debts due and owing or which may during the continuance of the security become due and owing to the said mortgagor." In the judgment, which was reversed on appeal by the House of Lords, it had been held that the assignment not being limited to book debts in respect of any particular business was invalid on the ground of indefiniteness, and that therefore it did not operate to pass the property in a debt which came into existence after the assignment.⁵ On appeal it was held that, as the particular debt in respect of which the suit was brought was capable of being identified with the subject-matter of the assignment, the assignment was valid and could not be defeated by the plaintiff. In the case of assignments which are thus intended to operate in the future "vague-ness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract."⁶ In the two cases next cited the instrument not only was affected with the vice of uncertainty of description, but also wanted operative words of intention to create a pledge. In the first,⁷ the creditor relied on the words:—"I promise to pay the whole principal in the month of and till payment I will not transfer any property by conditional sale or mortgage;" and in the second,⁸ on a covenant by the debtor "not to alienate the property of himself and his daughter for which he was about to sue, or the rest of his own property until the loan secured by the bond was paid off;" in this case further, it appeared from the book in which the

1 Ramsidh v. Balgobind, I. L. R., 9 All., 158; Baij Nath v. Sheo Sahoy, I. L. R., 18 Cal., 557.

2 Najibulla v. Nusir Mistri, I. L. R., 7 Cal., 196.

3 20 Ch. D., 758.

4 13 App. Cas., 523.

5 18 Q. B. D., 25.

6 13 App. Cas., p. 536; see note to section 6, ante p. 29.

7 Gunoo Singh v. Latafat, I. L. R., 3 Cal., 336, distinguishing Raj Kumar v. Ram Dutt Chowdry, 5 Beng. L. R., 264.

8 Najibulla v. Nusir Mistri, I. L. R., 7 Cal., 196; but see Ramsidh v. Balgobind, I. L. R., 9 All., 158.

document was registered, that there was no intention to charge immoveable property. These and numerous other cases go

A debtor's covenant not to alienate does not make a mortgage.

to establish the proposition that a mere covenant by the debtor not to alienate property, without further words showing an intention to pledge specific immoveable property does not constitute a mortgage.¹ Where, on the other hand, in addition to a covenant not to alienate "by deed of absolute sale or mukurraree or mortgage, or ticca pottahs or receiving zur-i-peshgee," the instrument in question contained a further clause which ran:—"Should we make all these transactions . . . the instrument relating thereto shall be deemed invalid and as executed in favour of nominal parties for the payment of the money secured by these lands," it was held that there was a simple mortgage.² Where the intention of creating a security is established as by the following instrument:—

"We, A and B, do hereby declare that we have mortgaged a house situate . . . in lieu of Rs. 300 to C and D for two years . . . that we agree that we shall pay the aforesaid sum in a period of two years to the mortgagee and get the thing mortgaged redeemed: that if we fail to pay the mortgage-amount within the period of two years the mortgagees shall be at liberty to recover the mortgage-amount in any way he pleases,"

the security is not to be regarded as exhausted on the expiration of the time fixed. "Here," said Stuart, C.J., in a suit brought by the mortgagee after more than two years on the above instrument, "we have a simple mortgage, which undoubtedly secured the property to the mortgagee until his debt was paid, the two years' condition being merely in the nature of a contingent promise or expectation of releasing the property by payment of the debt within that time, and not otherwise limiting the plaintiff's right under his security."³

According to the Stamp Act, in which 'mortgage' is described in similar terms,⁴ there must be a transfer of a right over specified property, moveable or immoveable.

1 Bhupal v. Jag Ram, I. L. R., 2 All., 449; Gunoo Singh v. Latafut, I. L. R., 3 Cal., 336; Sheikh Nosibulla v. Sheikh Naser, 8 Cal. Rep., 454, and cases above cited.

2 Raj Kumar v. Ram Dutt Chowdry, 5 Beng. L. R., 204; Lala Ramdhari v. Janessar, 6 Beng. L. R., App., 14; Surju v. Bhawani, I. L. R., 2, All., 481.

3 Phul Kuar v. Murli Dhar, I. L. R., 2 All., p. 531.

4 "Mortgage deed" includes every instrument whereby, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to or in favour of another a right over specified property. (Section 4 (13), Act I of 1879.) In the Schedule to the Act, for the purpose of assessing the stamp duty a distinction is made between the case when at the time of execution possession is given or agreed to be then given and the case in which possession is neither given nor promised: on this distinction see Anonymous Case, I: L. R., 13 Cal., 274; Hinganghat Mill Co. v. Rekchand, I. L. R., 8 Bom., 310.

In consideration of advances made, a planter assigned to the Agra Bank his then growing crop of coffee on trust to sell and to apply the proceeds in payment of the advances; it was further stipulated that the planter should remain in possession, prepare the crop, and deliver it to the Bank. The Madras High Court assuming, but not deciding, that this instrument created an interest in moveable property, held it to be a mortgage and not a mere hypothecation.¹ The same Court also regarded as a mortgage a document executed by a salt contractor to the Secretary of State, in which it was recited that the contractor had lodged in the treasury of the salt office Government promissory notes as security for the due performance of his contract, and it was witnessed that upon the completion of the contract to the satisfaction of the Deputy Commissioner he would cause the notes to be delivered up to the contractor.² When there is a pledge of goods effected by delivery of them to the creditor, it is difficult to understand how a document such as the above, merely recording the fact and the terms on which the pledge has been made, can be treated as transfer. Such a document is not a bill of sale within the English bills of sale Acts.³

A mortgage may be embodied in two instruments, the one purporting to be an absolute sale, the other declaring the sale to be conditional or giving the apparent vendor a right to redeem.⁴ Although the Evidence Act precludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of any written contract, grant, or disposition of property,⁵ it is competent to the Court to admit evidence of the conduct of the parties to show that a transaction, ostensibly on the face of the instrument a sale, was in fact entered into as a mortgage and not as a sale. The principle on which such evidence is admitted is thus stated in a case⁶ where the Statute of Frauds was in question:—

"The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between the plaintiff and Wright the transaction should be a mortgage-transaction, it is in the eye of the Court a fraud to insist on the conveyance as being absolute, and parol evidence

1 Reference under Stamp Act, I. L. R., 8 Mad., 104.

2 Reference under Stamp Act, I. L. R., 11 Mad., 39.

3 *Ex parte* Hubbard, 17 Q. B. D., 690; see too *Newlove v. Shrewsbury*, 21 Q. B. D., 41; compare *Meek v. Bayliss*, 31 L. J., Ch., 448 and cases in note 2, section 59.

4 *Kakerlaooddy v. Vutsavoy*, 2 Moo. I. A., 1; *Ram Saran v. Amirta*, I. L. R., 8 All., 369.

5 Evidence Act, section 92.

6 *Lincoln v. Wright*, 4 De G. & J., 16, cited in *Bakken v. Alagappudayan*, I. L. R., 16 Mad., p. 82.

"must be admissible to prove the fraud. Assuming the agreement proved, the principle of the old cases as to mortgages seems to me to be directly applicable; there is an absolute conveyance when it was agreed there should be a mortgage, and the conveyance is insisted upon in fraud of the agreement."

Acting on this principle, the High Court of Bombay in a case where the plaintiff sued in ejectment on the strength of an instrument of sale executed by the defendants, and the defendants asserted that it was agreed between the parties that the property should be treated as security for an advance and that the plaintiff should re-convey it whenever the debt should be discharged, dismissed the suit on finding that the oral agreement was proved partly by direct oral evidence and partly by the conduct of the plaintiff which was consistent with the character of a mortgagee, but inconsistent with that of a purchaser. The learned Judge who tried the case had found that the so-called purchase-money was far below the value of the estate, that for two years after the conveyance the defendants remained in possession not as tenants, but as owners, and that although the plaintiff was ultimately put in possession of a portion of the lands, this was done in consequence of an adjustment of accounts and a fresh arrangement between the parties for the repayment of the balance. The rule laid down was—

"That a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement as showing that an apparent sale was a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakably from the conduct of the parties that the transaction has been treated as a mortgage, the Court will give effect to it as a mortgage and not as a sale; and thereupon if it be necessary to ascertain what were the terms of the mortgage, the Court will for that purpose allow parol evidence to be given of the original oral agreement."¹

This decision has been followed in Calcutta,² where also a similar conclusion had previously been arrived at by a Full Bench of the High Court in a case decided independently of the Evidence Act.³ What was relied on in these two Bengal cases to show that a mortgage was really intended was, as in the Bombay case, the circumstance that possession was not given to the purchaser at the time of the sale and that the consideration mentioned in the instrument was small as compared with the selling value of the property. Conduct on the part of an ostensible vendee showing that he intended and understood a debt to be due from the other

¹ *Baksu v. Govinda*, I. L. R., 4 Bom., p. 609.

² *Hem Chunder v. Kally Churn*, I. L. R., 9 Cal., 528. See however judgment of *Muttusami Ayyar, J.*, in *Rakken v. Alagappudayan*, I. L. R., 16 Mad., p. 83.

³ *Kashi Nath v. Chandi Charan*, Beng. L. R., Sup. Vol., 383.

party may also serve to prove that a security and not a sale was intended.¹

It may be added that as the relief which a party has against one who has defrauded him is generally not available to him against a purchaser in good faith without notice, so the rule now under discussion does not apply as against "an innocent purchaser without notice of the existence of the mortgage who merely buys from a person who was in possession of the title-deeds and was ostensible owner of the property."²

Contracts for sale with a condition for re-purchase by the vendor or with a proviso for pre-emption on certain terms have to be distinguished from mortgages. Such transactions are not affected by the rules applicable to mortgages, and there is no right of redemption. "*Primâ facie* an absolute conveyance, containing nothing to show that the relation of creditor and debtor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to re-purchase."³ A transaction, however, which is in form a sale with a condition for re-purchase, may be shown to have been in the intention of the parties a mortgage, oral evidence of facts indicating such intention being admissible.⁴ It is a question of the intention of the parties, as exhibited in the terms of the instrument or instruments and in the other circumstances of the transaction. It may be shown, for instance, by the conduct of the apparent vendee in treating the consideration-money as a continuing debt due to him that the deed was intended as a mere security.⁵ The existence or non-existence of a power in the vendee to recover the sum, named as the price of the re-purchase, is an important

1 Govinda v. Jesha, I. L. R., 7 Bom., 73.

2 Kashi Nath v. Hurrihur, I. L. R., 9 Cal., 898; Rakken v. Alagappudayan, I. L. R., 16 Mad., 80.

3 Alderson v. White, 2 De G. & J., 105, cited in Bhagwan Sahai v. Bhagwan Din, I. L. R., 12 All., 391; which latter case is distinguished in Balkrishna Das v. Legge, I. L. R., 19 All., 434; see Ram Din v. Rang Lal, I. L. R., 17 All., 451. Manchester, &c., Railway Co. v. North Central Waggon Co., 13 App. Cas., 568.

4 Kader Moidin v. Nopean, I. L. R., 21 Cal., 882; Preonath v. Madhu Sudhan, I. L. R., 25 Cal., 603; Kakerlapoody v. Vutsavoy, 2 Moo. I. A., 1; Mutty Lal Seal v. Annundo Chander, 5 Moo. I. A., 72; Rajah Lakshmi v. Krishna Bhupati, 7 Mad. H. C., 6; Shaw v. Jeffery, 14 Moo. P. C., 432; Manchester, &c., Railway Co. v. North Central Waggon Co., 13 App. Cas., pp. 567, 568; Barton v. Bank of New South Wales, 15 App. Cases, 379.

5 Govinda v. Jesha, I. L. R., 7 Bom., 73; Patel Ramchod v. Bhikabhai, I. L. R., 11 Bom., 704; Vasudeo v. Bhan, ib., 528; Bapu v. Bhavani, I. L. R., 22 Bom., 247.

test to discover whether a sale or a mere security was intended. In the absence of such power to compel repayment there is no mutuality and the right to a re-conveyance is a mere privilege.¹ Other indications of intention may be found in the fact that interest is or is not charged on the purchaser's money, and the purchase-money is equal to or far short of the value of the property. If provision is made for interest and the sum paid falls materially short of the value of the property, the inference that a mortgage was intended becomes strong. In a Madras case where an instrument called *muddatakriyam* was under consideration, of which the material words were as follows:—

"As I have conveyed to you as sale for Rs. 6,000 these lands, they are given you for absolute sale; in the event of my paying you the principal Rs. 6,000 within six months from this date, you must give me back the said lands; in the event of our not being able to pay according to the said stipulation, you should hereditarily enjoy the produce of the said lands yourself paying assessment, reckoning this sale-money to be a pure sale,"

it was held that the instrument was in its natural construction a sale with liberty to re-purchase, and that thirty years' possession by the defendants, as also the fact that there was no remedy for the vendor's money and no interest was charged upon it, were circumstances pointing to the same conclusion.² So in a recent Bombay case where in consideration of a debt of Rs. 150 the plaintiff had executed in favour of the defendant an instrument under which the defendant was to hold for twenty years and then restore the land to the plaintiff free from all claims, it was held that the transaction was not a mortgage because there was no stipulation for interest and no agreement to pay the Rs. 150.³ In an Allahabad case the document in question was to the following effect. It first recited an absolute sale to the executant, Ram Saran, and then declared that Ram Saran agreed that the vendors might within a term of ten years pay the sale-consideration, the deed of sale being in that case cancelled; that in the event of the whole sum not being paid, any one of the vendors paying his quota of the sale-consideration, the sale of his share should be invalid; and that if the sale-consideration were not paid, and he, Ram Saran, should have to foreclose, he should be entitled to realise his costs from the vendors personally, &c. On the strength of this reference to redemption, the

1 Dart's Vendors and Purchasers, 6th ed., p. 925; *Subhabhat v. Vasudevhat*, I. L. R., 2 Bom., 113; *Situl Purshad v. Luchmi*, I. L. R., 10 Cal., 30; *Ayyavayyar v. Rahimansa*, I. L. R., 14 Mad., 171.

2 *Rajah Lakshmi v. Krishna Bhupati*, 7 Mad. H. C., 6; see also *Situl Purshad v. Luchmi*, I. L. R., 10 Cal., 30; s.c., L. R., 10 I. A., 129.

3 *Abdulbhai v. Kashi*, I. L. R., 11 Bom., 462.

majority of the Court held that the transaction amounted to a mortgage. But Stuart, C.J., considered that the document being a mere declaration by the mortgagee could not have the effect of reserving to the mortgagor a right of redemption.¹

If the vendor of property stipulates for its re-conveyance, to him on certain terms, he must, in order to entitle himself to the re-conveyance, act up to those terms strictly,² for the right of redemption is regarded as a privilege. Thus where a time is fixed for payment of the purchase-money, the money must be paid within that time unless there is a waiver by the party entitled to receive, but if the amount to be paid depends upon an account to be rendered by that party there is no default on the other side until the account has been rendered.³

In cases where the transaction takes the form of a lease or an assignment of a term, the question whether a mortgage was intended has to be determined in the same way as when the same question arises with regard to an instrument which is on its face a sale with a condition for re-purchase. It may be shown that the object of granting the lease or term was to give a security for a debt owing by the ostensible lessor, and that the transaction in fact intended was in the nature of a usufructuary mortgage.⁴ "Zur-i-peshgi leases or leases granted on a sum of money being advanced are on the same footing as pure usufructuary mortgages and are dealt with as such, but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly."⁵ If there is no term mentioned, the party entitled as mortgagor has, on showing that a mortgage was intended, the right to recover as soon as the principal debt and interest have been paid off by the usufruct.⁶ If a term is fixed with the intention that the mortgagor shall not redeem before its expiry, the mortgagee is entitled to retain possession till it has expired.⁷ In a Madras case the defendant, having

1 *Ram Saran v. Amirta*, I. L. R., 3 All., 369, 370.

2 *Dart's Vendors and Purchasers*, 6th ed., pp. 240, 926; *Chidambara v. Manikka*, 1 Mad. H. C., pp. 63, 65; *Gurusamy v. Swaminadha*, 2 Mad. H. C., 450; *Situl Purahad v. Luchmi*, I. L. R., 10 Cal., 30.

3 *Ponsford v. Hankey*, 2 Giff., 604.

4 For instances see *Kamala Naicken v. Pitchacooty*, 10 Moo. I. A., 386; *Dorappa v. Kundakuri*, 3 Mad. H. C., 363; *Nellaya Vafiyath v. Vadakapat Munakel*, I. L. R., 3 Mad., 382, where question was whether a *kanam* was a mortgage or not.

5 Cited in *Basant Lal v. Tapesbri Rai*, I. L. R., 3 All., p. 4; and see *Gopal Sitaram v. Dessi*, I. L. R., 6 Bom., 676.

6 *Lala Doul Narain v. Runjit Singh*, 1 Cal. L. R., 256.

7 See *post* section 60, note 1.

advanced Rs. 1,400 to the plaintiff, was, by way of security, put in possession of the plaintiff's premises for eight years. The whole rent was arranged to be Rs. 16-12, and of it the defendant was to retain Rs. 14 in satisfaction of his claim and to pay the rest, viz., Rs. 2-12 to the plaintiff. It was held that the question whether the plaintiff could recover this sum, which the defendant had discontinued paying in consequence of the destruction of the premises by fire, must be decided on the footing that the parties were mortgagor and mortgagee and not landlord and tenant.¹

Note 2. (b) In a simple mortgage under the Act the specific characteristics are the personal obligation to pay the mortgage-money and the power, express or implied, to cause the mortgaged property to be sold, through the intervention of the Court. There is no transfer of ownership.²

It may be compared with *hypotheca* as known to Roman law, of which it has been said that "it is a contract whereby one party grants to another a real right on his property as security for a debt contract—ed. . . The principal difference between *pignus* (pledge) and *hypotheca* "consists in the actual possession remaining with the debtor—a particular object is subjected or obligated to another as security for the debt; hence it follows that that especial thing is more particularly liable than anything else belonging to the debtor, and differs from a *hypotheca* in name only—one having, so far as the remedy by action is concerned, no advantage over the other. . . In *hypotheca* the dominion or legal estate passes to the creditor, but the usufruct or use remains with the debtor."³

The name 'simple mortgage' has been generally applied to transactions in which the borrower, binding himself personally for the repayment of the loan, pledges his land as a collateral security. It is known under various vernacular terms, e.g., *drishṭa bandhaca*,⁴ in the Bombay Presidency *nazar* or *taran-gahan*,⁵ in Madras *idu adamanam*. Speaking of such mortgages in 1876 Turner, J., observed.—"It comprises

1 Venkateshwara v. Kosava, I. L. R., 2 Mad., 187.

2 Pappanna Rao v. Ramachandra Raju, I. L. R., 19 Mad., 252.

3 Colquhoun's Roman Civil Law, § 464.

4 See 1 Strange's Hindu Law, p. 289, Rangasami v. Muttukumarappa, I. L. R., 10 Mad., p. 516; of the two instruments in Venkata v. Parvati, 1 Mad. H. C., 460, the first is rather a mortgage by way of conditional sale, the second may possibly be regarded as a *drishṭa bandhaca*.

5 Onkar v. Govardhan, I. L. R., 14 Bom., p. 577; Datto v. Yithu, I. L. R., 20 Bom., 418.

"two contracts, a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make this security available he must obtain an order of a Civil Court directing a sale."¹ Numerous specimens of such mortgages may be found in the reported cases.² Sometimes there is an express provision that the debt may be recovered by suit, but such a clause is not indispensable and may be implied from the context;³ and so where the terms of the instrument provided that if the borrower should fail to pay, he should, without objection taken, cause the settlement to be made with the lender, the Privy Council treated the transaction as a simple mortgage.⁴ In the cases above-cited the distinction drawn by the present Act between a mortgage and a charge was not recognized.⁵

In the Madras Presidency securities of this kind have long been recognized, being commonly known as hypothecations. With reference to a case in which the instrument declared that "on failing to pay the amount within the said term, we will sell the land to you for the said amount, 'present a *razinama* and have the patta transferred," Holloway, J., held that the contract was one of hypothecation giving an interest in immovable property within the meaning of clause 12 of section 1 of the Limitation Act of 1859.⁶ That interest, although not accompanied by any right to possession, is available as security for the satisfaction of the debt against even a purchaser in good faith without notice.⁷ The holder of a hypothecation-bond has his remedy, as well personally

1 *Khuh Ohund v. Kalian*, 1 L. R., 1 All., p. 244; *Pupamma Rao v. Ramuchandra Rao*, 1 L. R., 19 Mad., 249.

2 *Phul Kuar v. Murli Dhar*, 1 L. R., 2 All., p. 528; *Badri v. Daulat*, 1 L. R., 3 All., p. 707; *Piari v. Khiali*, *ib.*, p. 857; *Ram Din v. Kalika*, 1 L. R., 7 All., p. 504; *Jachmipat v. Mirza Khairat Ali*, 4 Beng. L. R., F. B., 18; *Onkar v. Govardhan*, 1 L. R., 14 Bom., 577.

3 See *Motiram v. Vitai*, 1 L. R., 13 Bom., p. 92; *Kishan Lal v. Ganga Ram*, 1 L. R., 13 All., p. 47.

4 *Gokuldass v. Kriparam*, 13 Beng. L. R., 205.

5 *Girwar Singh v. Thakur Narain*, 1 L. R., 14 Cal., 739; *Ram Din v. Kalka*, *supra*.

6 *Chetti Caundan v. Sundaram*, 2 Mad. H. C., 54; see *Vellaya v. Moorthy*, 4 Mad. H. C., 174.

7 *Kadarsa v. Ramiah*, 2 Mad. H. C., 108; *Golla Chinna v. Kali*, 4 Mad. H. C., 434; *Sadagopa v. Ruthna*, 5 Mad. H. C., 457; *Cooling v. Saravana*, 1 L. R., 12 Mad., 69; see however *Kishan Lal v. Ganga Ram*, 1 L. R., 13 All., 28.

against the debtor as by suit for sale of the hypothecated property, and he may pursue both remedies in one suit.¹

In Bombay it has been held in conformity with the general doctrine,² until recently there maintained, that as *Bombay cases.* against subsequent mortgagees or purchasers taking without notice, a mere mortgage without possession does not give a good title. According to this view a subsequent incumbrancer is only affected by a prior mortgage if it be shown that he had notice of the mortgage, or, what is there regarded as equivalent to notice, that there was registration of the mortgage or possession under it. The limitations upon and exceptions to this rule are stated in the judgment in *Lakshmandas v. Dasral*.³ The most important exception is in favour of *san* mortgages in Gujarat, such mortgages being valid without possession and independently of notice.⁴ Another exception is in favour of the second mortgagee of property in the possession of a prior mortgagee.⁵ The rule does not apply when the person claiming in competition with the prior mortgagee is the mortgagor himself or a volunteer claiming under him;⁶ nor does it apply as against a purchaser at a Court sale, for such purchaser can take only that which the judgment-debtor could honestly dispose of;⁷ nor does the rule hold good as between the mortgagee and trespassers on the mortgaged property. It is competent to him without having taken possession to sue such persons for possession.⁸

In most of the cases cited above the instrument contained a clause empowering the lender to bring the mortgaged property to sale. In the absence of such a clause the *Power of sale.* question arises whether the instrument can be said to be a mortgage

1 *Annaswami v. Narraiyen*, 1 Mad. H. C., 114; *Muni Reddi v. Venkata*, 3 Mad. H. C., p. 243, so in *Allahabad per Turner, J.*, *Khub Chund v. Kalian*, 1 L. R., 1 All., 244.

2 See *ante* pp. 30, 140.

3 1 L. R., 6 Bom., 176; see *Dhondo Balkrishna v. Raoji*, 1 L. R., 20 Bom., 290; *Lalubhai v. Bai Amrit*, 1 L. R., 2 Bom., 299.

4 *Ranchoddas v. Ranchoddas*, 1 L. R., 1 Bom., 581; *Parmaya v. Sonde Shrinivasapa*, 1 L. R., 4 Bom., 459.

5 *Lalubhai v. Bai Amrit*, *supra*; *Kachu Bayaji v. Kachoba*, 10 Bom. H. C., 491.

6 *Jivandas v. Framji*, 7 Bom. H. C., (O. C.), 45, where the cases are elaborately reviewed; *Chintaman v. Shivram*, 9 Bom. H. C., 304.

7 *Sobhagchand v. Bhaichund*, 1 L. R., 6 Bom., 193; *Bapnji v. Satyabhamabai*, *ib.*, 493; *Maganlal v. Shakra*, 1 L. R., 22 Bom., 945; for form common in Kanara, see *Venkatesh v. Narayan*, 1 L. R., 15 Bom., 184; *Parmaya v. Sonde Shrinivasapa*, 1 L. R., 4 Bom., 459.

8 *Krishnaji v. Govind*, 9 Bom. H. C., 275.

within the meaning of the Act. The following are specimens of this kind of security. In *Sheoratan v. Mahipal*¹ the material part of the instrument was as follows:—"We promise and agree to pay this sum, "principal, together with interest at 2 per cent. per mensem, on the 3rd "May, 1882: we shall pay in full the principal together with interest "at the aforesaid rate: to secure this money we have mortgaged (*ruhu*) "and hypothecated (*mustagrah*) a 5 gandas share out of a 10 gandas "share in each of the manzas Barigaon and Malhipur, with this condi- "tion that so long as the principal amount with interest is not paid to "the aforesaid bankers, the hypothecated share shall not be sold or "mortgaged to any one, and if we do so, such act shall be invalid; we "have therefore executed this hypothecation-bond that it may be of use "when needed." In *Kishan Lal v. Ganga Ram*,² the instrument was substantially in the same form, as also apparently in the earlier case of *Gopal v. Parsolam Das*.³ Another common form of instrument is given in *Khemji v. Rama*,⁴ and was the subject of discussion in that case and in *Girwar Singh v. Thakur Narain*.⁵ It is as follows:—

"Bond for debt, dated the 30th of *Bhadrapad Vadya* in the *Shake* year 1788 (8th October 1866). On this day this bond is given in writing to the creditor Rajeshri Khinji Bhagvandas Gujar, mortgagee *khot* of village Karjani by the debtor Arjunji Naik bin Tataji Naik Khot. I owe you Rs. 44. The mortgage-bond for the same is of the *Shake* year 1783 (1861-62 A.D.); five maunds of rice are to be given as interest for the same every year. I have received credit for the rice already paid, and, as to the balance of rice due, I agree to pay you a lump sum of Rs. 19 as the price thereof. The interest for the same is to run at one per cent. I will pay the principal and interest on making an account thereof until payment. There is a mortgage-bond for Rs. 44 whereby certain land is mortgaged to you. The said land stands also security for this amount (Rs. 19). When I will come to pay the amount of the bond of the *Shake* year 1783 (1861-62 A.D.) I will pay the amount of both bonds on making an account, and I will redeem the property mortgaged in *Shake* 1783 (1861-62 A.D.). The time fixed for the payment of the amount of this bond is two years. If I give the amount before the time (fixed), you are to receive the same. As to the amount of Rs. 44, due on the bond of the *Shake* year 1783 (1861-62 A.D.), the interest thereof has been paid off up to the 1st of April, 1866. This bond I have of my free will and pleasure duly given in writing."

Similar to this last form is the instrument in *Rangasami v. Muttu-kumarappa*.⁶ "Deed of hypothecation of. . . Having pledged to you

1 I. L. R., 7 All., 258.

2 I. L. R., 13 All., 28.

3 I. L. R., 5 All., 121.

4 I. L. R., 10 Bom., 521; and *Tukaram v. Khandoji*, 6 Bom. H. C., (O. O.), 134; see the similar form in *Venkatesh v. Narayan*, I. L. R., 15 Bom., 184.

5 I. L. R., 14 Cal., 730.

6 I. L. R., 10 Mad., 511.

"this day the house. . . the amount is Rs. 99-12. . . we bind ourselves to pay the said Rs. 99-12 together with interest at one per cent. per mensem within seven years from the date and take back the "hypothecation-bond." Apparently the instrument in *Aliba v. Nanu*¹ was similar. It has been held in Bombay that an instrument under which the mortgagor retains possession in the first instance and covenants to pay interest yearly during the term of the mortgage, and on default to deliver the property into the possession of the mortgagee, is not a usufructuary but a simple mortgage.²

Notwithstanding various decisions to the contrary,³ there can be little doubt that for all purposes of this Act the common form of security, known as hypothecation, is a simple mortgage, and the holder is a mortgagee, although the only right that he has over the land is the right to have it sold through the intervention of the Court.⁴ The contrary view according to which there is no mortgage, unless there is a transfer of ownership, a right of entry, or a power of sale out of Court, is not admissible, since it would in effect exclude from the definition of mortgage a large class of instruments, regarded and described by the people and the Courts as mortgages.⁵

Apart from limitation the question whether an instrument amounts to a mortgage or a charge only is of no great importance with reference to the right and liabilities arising out of it, for by section 100 the holder of a charge and the simple mortgagee are put on much the same footing (see note to section 100), and the Madras Judges while holding that hypothecation and mortgage were not synonymous in reference to limitation, did not deny that hypothecation gave the creditor a right available against subsequent purchasers from the debtor.⁶

In several of the cases above cited the question actually decided was one of limitation, turning on the construction of article 132 and article 147 of the schedule to the Limitation Act. In Calcutta it has been consistently held that the suit for sale which may be brought by the holder of a simple mortgage

Limitation.

¹ 1 I. L. R., 9 Mad., 218.

² *Yashvant v. Vithal*, 1 I. L. R., 21 Bom., 267.

³ *Per Muttusami Ayyar, J.*, in *Rangasami v. Muttukumarappa*, 1 I. L. R., 10 Mad., 509; *per Birdwood, J.*, in *Khemji v. Rama*, 1 I. L. R., 10 Bom., 519; *per Petheram, C. J.*, in *Sheoratan v. Mahipal*, 1 I. L. R., 7 All., 266; *Kishan Lal v. Ganga Ram*, 1 I. L. R., 13 All., 28.

⁴ *Kishan Lal v. Ganga Ram*, 1 I. L. R., 13 All., 28; *Datto v. Vithu*, 1 I. L. R., 20 Bom., 408; *Papamma Rao v. Ramachandra Rao*, 1 I. L. R., 19 Mad., 240.

⁵ *Motiram v. Vitai*, 1 I. L. R., 13 Bom., 97.

⁶ See *ante* p. 185.

or hypothecation is governed by article 132, being a suit "to enforce payment of money charged upon immoveable property."¹ In Bombay the opposite view has been maintained,² as also in Allahabad.³ In both Courts it has been held that article 147 applies, although the instrument sued on is merely an instrument of hypothecation or simple mortgage. In the Madras cases with one exception the decision has been in favour of the application of article 132. In some of the cases this result was arrived at by holding that a hypothecation executed before this Act came into force could not be treated as a mortgage so as to make article 147 applicable. In those cases it was practically assumed that with a similar instrument executed after the 1st July 1882 article 147 would have to be associated.⁴ On the other hand in a recent Full Bench case, it has been held that, although the instrument may be an instrument of mortgage, article 147 does not apply, unless the suit is the ordinary foreclosure suit as known in the English Courts. In so holding the Court has followed *Girwar Singh's* case. It is pointed out that the introduction of article 147 was owing to the want of any article in the Act of 1871 appropriate to such a suit; since it cannot be said to be a suit for money falling within the terms of article 132, and it cannot be supposed that the Legislature intended to couple in one article two such different suits as the suit for sale and the suit for foreclosure in which sale may be decreed for the benefit of the mortgagor if he does not choose to redeem.⁵

Note 3. (c) The form of security described as mortgage by conditional sale, has long been of common use in this country. It is known in Bengal as *kathabala* or *bye-bil-wufa*,⁶ in Madras as *muddatukriyam*,⁷ in Malabar as *peruartham*⁸ and in Bombay as *gahan lahun*.⁹ It may take the form

Mortgage by conditional sale.

1 *Girwar Singh v. Thakur Narayan*, I. L. R., 14 Cal., 733.

2 *Datto v. Vithu*, I. L. R., 20 Bom., 408, where all the cases are reviewed and *Khemji v. Rama*, I. L. R., 10 Bom., 519, is over-ruled.

3 *Shib Lal v. Ganga Prasad*, I. L. R., 6 All., 551; *Sheoratan v. Mahipal*, I. L. R., 7 All., 258.

4 *Aliba v. Nanu*, I. L. R., 9 Mad., 218; *Rangasami v. Muttukumarappa*, I. L. R., 10 Mad., 511.

5 *Ramachandra v. Modhu*, I. L. R., 21 Mad., 326; *Perianna v. Muthuvira*, I. L. R., 21 Mad., 139.

6 *Gokuldass v. Kriparam*, 13 Beng. L. R., 205; *Ali Ahmad v. Rahmatullah*, I. L. R., 14 All., 195.

7 See form in *Lakshmi v. Krishna*, 7 Mad. H. C., p. 9.

8 *Shekari Varma Valia v. Mangalom Amugar*, I. L. R., 1 Mad., 57.

9 See forms in *Ramji v. Chinto*, 1 Bom. H. C., (A. C.), p. 201; *Bapuji v. Senavaraji*, I. L. R., 2 Bom., p. 253. For the form of mortgage without possession common in Kanara, see *Venkatesh v. Narayan*, I. L. R., 15 Bom., p. 184.

of a mortgage in the first instance with a condition for sale on default, or of a sale with a counter-agreement for a resale. While it may or may not be accompanied by possession, the essential characteristic of it, according to what may be styled the common law of India, is that on breach of the condition the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them.¹ On the part of the mortgagee no proceeding to effect a foreclosure was necessary. On the part of the mortgagor there was no right to an extension of the time within which it was stipulated that he should perform the condition. In other words, there was no equity of redemption recognised in the case of such security, any more than there was in the case of a sale with a condition for repurchase, where no security is intended.² The maxim 'once a mortgage always a mortgage' is no more part of the common law of this country than it is of that of England.

In Bengal this state of the law was altered, so far as mortgages in writing were concerned, by the Regulations I of *Bengal Regulations.* 1798 and XVII of 1806, whereby a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of equity have long imposed on mortgages in England, was effected.³ It is only by the present Act that these Regulations are repealed. In Madras and Bombay, on the other hand, there was no such legislation. But in both Presidencies it happened that by a course of decisions founded on English notions of equity, judicial sanction was given to a practice which assimilated the law relating to mortgages by way of conditional sale to that administered by the Court of Chancery.

In Madras these decisions began with the year 1858, and, though the principle of them was disapproved by the *Madras cases.* Privy Council in 1870,⁴ they were not definitively overruled until 1875.⁵ In *Pattabhiramier's* case which came before the Judicial Committee in 1870, the instrument contained a clause to the

1 *Thunbusamy v. Hoosain*, 1 L. R., 1 Mad., p. 16.

2 See *ante* p. 181; see *Ladu v. Babaji*, 1 L. R., 7 Bom., 534.

3 See *Forbes v. Ameroonissa*, 10 Moo. I. A., 340; *Gokuldass v. Kriparam*, 13 Beng. L. R., p. 212; *Norender Narain v. Dwarka Lal*, 1 L. R., 3 Cal., 397; *Kishori Mohun v. Ganga Bahu*, 1 L. R., 23 Cal., 228, 244. The Reg. XVII of 1806 did not apply to mortgages not reduced to writing; *Gobar Dhan v. Gokal Das*, 1 L. R., 2 All., 633.

4 *Pattabhiramier v. Venkatarow*, 13 Moo. I. A., 560; s.c., 7 Beng. L. R., 186; see also *Venkata v. Parvati*, 1 Mad. II. C., 460.

5 *Thunbusamy v. Hoosain*, 1 L. R., 1 Mad., 1.

effect that the mortgagor might redeem the land by payment of the principal money within five years, and that on default the mortgagee and his posterity were to enjoy the land, as if from the first the transaction had been an absolute sale with the right of alienating the same by gift or sale. After default had been made the mortgagee, without any process of foreclosure, sold the lands to the ancestor of the defendant, and the suit was brought for redemption by the heirs of the mortgagors. A decree for redemption was made by the Sadr Court, and against it the defendant appealed. The Judicial Committee, after referring to certain Bengal cases¹ in which it had been held that apart from the Regulations a deed of conditional sale became absolute according to the terms of the contract by the mere failure of the mortgagor to redeem within the stipulated period, and observing that in Madras the law had not been qualified by the introduction of such Regulations as those passed in Bengal, proceeded to say:—

“What is known in the law of England as the ‘equity of redemption’ depends on the doctrine established by Courts of equity that the time stipulated in the mortgage-deed is not of the essence of the contract. Such a doctrine was unknown in the ancient law of India; and if it could have been introduced by the decisions of the Court of the East India Company, their Lordships can find no such course of decisions. In fact the weight of authority seem to be the other way.”²

In *Thumbusawmy's* case which came before the Judicial Committee in 1875, the High Court had re-asserted the doctrine on which the Sadr Court had acted, and referring to the above quoted observation as to the absence of any course of decisions, observed:—

“It is otherwise, for the decisions of the late Sudder Court since 1858 have carried the doctrine so far as to say that wherever the security for money is an object of the transaction, no sale can become absolute. The High Court have followed the English rule which the Sudder Court intended to follow, and have held the question to be one of construction, admitting however for the purposes of the construction other documents and oral evidence.”³

The instrument in this case was a peculiar one, for it provided that within a certain time a settlement of the accounts should be made, and that the amount found due should be paid on a certain day. “If by the day named the money be not paid in full, and a balance still remain due, you yourself shall take, hold and enjoy such of the lands as you may like and as may be equivalent to the balance due at pons fifty per

1 *Sureefoonissa v. Shaikh Enayet*, 5 W. R., 88; *Forbes v. Amecroonissa*, 10 Moo. I. A., 348.

2 13 Moo. I. A., p. 571.

3 I. L. R., 1 Mad., p. 21; *Lakshmi Chelliah v. Zamindar of Madugula*, 7 Mad. H. C., 6. The decisions referred to are collected in *Ramasami Sastrigal v. Samiyappanayakan*, I. L. R., 4 Mad., 179.

"veli, as if under the terms of a deed of absolute sale." The obligation to pay on the day fixed was not to attach until the balance should have been ascertained by an account, in which the mortgagee being in possession was necessarily the accounting party. On these facts and on a finding that the money due had never been paid and no settlement of account had been made, it was considered that the security was not in the nature of a conditional sale, and that therefore the decision in *Pattabhiramier's* case was not applicable.¹ The mortgage was therefore redeemable. Nevertheless the Judicial Committee took the opportunity of reviewing the Madras as well as the Bombay decisions, and in accordance with the view expressed in *Pattabhiramier's* case of expressing the opinion that these decisions were radically unsound. They further declared their disapproval of the doctrine whereby "the distinction between sales with a condition for re-purchase and mortgages by conditional sale was made to depend upon the intention of the parties to the original transaction proveable, if need be, by oral evidence." In answer to the question whether in future the decision in *Pattabhiramier's* case or the decisions of the Bombay and Madras Courts should be followed, it was said:—

"On a stale claim to redeem a mortgage and dispossess a mortgagee who had before 1858 required an absolute title, there would be strong reasons for adopting the former course. In the case of a security executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities with reference to which the parties might be supposed to have contracted."²

Finally, it was observed that the case was one which seemed to call for the interposition of the Legislature. In *Bapirazu v. Kamarazu* (1881)³ occasion arose for putting into practice the rule laid down by the Privy Council. In that case the plaintiff by an instrument of May 1846, admitting that a sum of Rs. 40 was due to the defendant, promised to pay it in March 1848. Meanwhile the defendant was to appropriate the profits of the land and, on default of payment by the plaintiff at the expiry of the term, the defendant was to enjoy the land as if sold to him on account of the balance due under this instrument. It was held that this was a mortgage which became a sale on the non-fulfilment of the condition, and that, inasmuch as it was executed before 1858, the suit for redemption was not maintainable. In a later case the question, how a similar mortgage executed since 1858 should be treated arose for consideration. It was decided by a majority of the Full Bench that effect should be given to the suggestion made by the Privy Council with

1 See Mavulali Amirudin v. Gundu Sobhanadri, I. L. R., 6 Mad., 339.

2 I. L. R., 1 Mad., p. 23.

3 I. L. R., 8 Mad., 26.

regard to such cases, and the decree for redemption was accordingly allowed to stand.¹ And this decision was followed in a recent case where the Court observed that under the Privy Council ruling liberty was allowed to apply the doctrine of the English Courts of equity to mortgages, executed after 1858 and before the passing of this Act.² In a case, where a Muhammadan mortgaged an estate in 1832 and the period for re-payment was to expire in eight years, another point was raised in favour of the right of redemption.³ Under the Madras Regulation XXXIV of 1802 (Bengal Reg. XV of 1793) which was passed with the object of fixing the rate of interest and preventing the taking of interest in excess of it, the mortgagee could be compelled upon a redemption to render an account of the rents and profits. It was contended that as the mortgagee was in point of law bound to render an account before the contract could execute itself, the case was governed by the decision in *Thumbusawmy's* case. But this contention was overruled, the Court pointing out that in the case relied on it was provided by express contract that an account should first be taken, and also referring to the language used in *Pattabhramier's* case, where, on reference being made to the same Regulation of 1802, their Lordships had said:—

“As to that (the usufruct) the Regulations have made it necessary contrary to “the intention of the parties to take upon a redemption an account of the rents and “profits as between mortgagor and mortgagee in possession, compelling the latter “to set what he might have received in excess of legal interest against principal; “but they have neither extended the time for redemption nor imposed on the mortgagee the obligation of taking any judicial or other proceeding to make his title “absolute.”

In Bombay from the year 1864 the Court followed the example set by the Madras Court and adopted “the doctrine of *Bombay cases*. “the English Court of equity, viz., that wherever an “instrument, though in terms transferring an estate, is originally “intended between the parties as a security for money, it shall always “be considered as a mortgage, redeemable on payment of the amount it “was given to secure.”⁴ In applying this doctrine to a *gahan-lahan* mortgage as an admitted innovation on the law settled by the Sadr decisions, the Court left it as a matter to be decided on the circumstances of each case, whether the mortgagee who had effected

1 *Ramasami Sastrigal v. Samiyappanayakan*, I. L. R., 4 Mad., 179.

2 *Venkatasubbayya v. Venkayya*, I. L. R., 15 Mad., 230.

3 *Mallikarjunudu v. Mallikarjunudu*, I. L. R., 8 Mad., 185.

4 *Ramji v. Chinto*, 1 Bom. H. C., (A. C.), 199, approving *Venkata v. Parvati*, 1 Mad. H. C., 460; *Andranav v. Ravji*, 2 Bom. H. C., (A. C.), 225.

improvements in the property should be entitled to compensation therefor. In a later case (1872) it was observed by the Court:—

“The rule (i.e., of allowing the mortgagor in a *gahan-lahan* mortgage to redeem) has ever since the decision of *Ramji v. Chinto* been uniformly and steadily acted upon, tempered however as it was in *Ramji v. Chinto* by requiring the redeeming mortgagor, where the mortgagee under the impression that he had become absolute vendee had laid out money on the premises for their improvement, to recoup the mortgagee to the value of such improvement.”

When that case was decided, the decision in *Pattabhisamier's* case¹ was before the Court, and it was dealt with in a manner similar to that adopted by the Madras Court. Quoting a passage from the judgment of the Judicial Committee, in which it is said—“It must not be supposed that in allowing this appeal their Lordships design to disturb any rule of property established by judicial decisions, so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon,” the Court adhered to the doctrine then said to have been firmly established for the last eight years.²

In the cases above referred to, with the exception of *Thumbusawmy's* case,³ the mortgage was strictly in the nature of a mortgage by conditional sale—a transaction in which the sale would execute itself without any intervention of the parties. So far as regards such mortgages in Madras executed before the 1st July 1882 the relations of the parties will, it is apprehended, be governed by the above-cited decisions. To mortgages executed after that date the rules laid down by the Act are of course applicable.⁴ In Madras the right to bring a foreclosure suit, denied by the Sadr Court, has been maintained by the High Court.⁵ But in Bengal such suits in respect of mofussil mortgages were unknown, and so the only suit open to the mortgagee was a suit for possession to which article 135 of the Limitation

Limitation.
Act would apply.⁶ Time runs against the mortgagee under article 135 either from the date of the expiration of the year of grace allowed under the provisions of Reg. XVII of 1806, or, if the mortgage contained a stipulation that the mortgagee may take

1 13 Moo. I. A., 560; s.c., 7 Beng. I. R., p. 140.

2 See *Shankaribhai v. Kassibhai*, 9 Bom. H. C., 69, 71, 72; see also *Krishnaji v. Ravji*, ib., 79; *Bapuji v. Senavaraji*, 1 I. R., 2 Bom., 230; *Mahomed v. Jijibhai*, I. L. R., 9 Bom., p. 525; *Ramchandra v. Janardan*, I. L. R., 14 Bom., 19; *Abdul Rahim v. Madhavray*, ib., 78.

3 I. L. R., 1 Mad., 1.

4 *Perayya v. Venkata*, I. L. R., 11 Mad., 409.

5 *Venkatachellam v. Tirumala*, 2 Mad. H. C., 289.

6 *Shurnomoyee v. Srinath Das*, I. L. R., 12 Cal., 614; on appeal I. L. R., 16 Cal., 643.

possession on default being made, from the date of such default.¹ In cases governed by the present Act under which a suit for foreclosure is admissible, article 147 is applicable.²

Note 4. (d) The circumstance common to all usufructuary mortgages, is, as the name implies, that the creditor is placed, or is entitled to be placed, in possession of the property to enjoy the rents and profits until his claim is satisfied. There is a transfer to him of one of the incidents of ownership, *viz*, the right of possession and enjoyment of the usufruct.³ The ordinary vernacular name for such a mortgage is *bhogyam* or *bhogyā bandhaka*,⁴ or in the Madras Presidency *swadhina adamanum*. It is a matter for contract between the parties on what terms the mortgagee should enjoy. It may be that a mere temporary exchange of money for possession is made, the arrangement being to this effect—"I lend the money and you the land. If either of us want that which he has lent, he shall restore that which was lent to him."⁵ Or a certain term of enjoyment may be fixed, as in the case of the *zur-i-peshgi*⁶ lease, in the Malabar *otti* or *kanam*,⁷ and usually in the *iludurawara* of Canara.⁸ Further, with regard to the manner in which the rents and profits are to be treated, it may be arranged that the mortgagee shall enjoy them instead of interest for his money, the principal meanwhile remaining undiminished. Or it may in addition be stipulated that a certain sum, or the balance after satisfying the interest, shall go to reduce the principal. Again, the mortgagee may, if a certain period of enjoyment be assured to him, be content with the rents and profits in complete satisfaction of his whole claim.⁹ Or, lastly, the arrangement may be that

1 *Modnn Mohun v. Ashad Ally*, 1 L. R., 10 Cal., 68; *Murlidhar v. Kanchan Singh*, 1 L. R., 11 All., 144, following *Deonath v. Narasingh*, 14 Beng. L. R., 87; *Brajanath v. Khilat Chandra*, 8 Beng. L. R., 104; s.c., 14 Moo. I. A., 144.

2 See *Girwar Singh v. Thakur Narain*, 1 L. R., 14 Cal., 730; *Nilainal v. Kamini Koomar*, 1 L. R., 20 Cal., 269, and *ante* p. 189.

3 *Per Mahmood, J.*, 1 L. R., 7 All., p. 558; *Tewarce v. Kasconauth*, W. R. (F. B.), p. 79; *Motiram v. Vitai*, 1 L. R., 13 Bom., p. 100.

4 *Lakshmi v. Ramappa*, 1 Mad. H. C., 70; *Islan Chandra v. Sujan*, 7 Beng. L. R., 14; 2 *Strange's Hindu Law*, p. 461.

5 *Vanneri v. Patanattil*, 2 Mad. H. C., 382; *Ramayya v. Gurva*, 1 L. R., 14 Mad., 232.

6 *e.g.*, *Basant Lal v. Tapeshri Rai*, 1 L. R., 3 All., 1.

7 *Edathil v. Kopashon*, 1 Mad. H. C., 122; *Keshava v. Keshava*, 1 L. R., 2 Mad., 45. The use of the word 'kanam' does not necessarily import a mortgage, see *Krishnan v. Veloo*, 1 L. R., 14 Mad., 301, *post* p. 196.

8 *Mailaraya v. Subbaraya*, 1 Mad. H. C., 31; *Perlathail v. Mankude*, 1 L. R., 4 Mad., 113.

9 For illustration see *Bapuji v. Satyabhamabai*, 1 L. R., 6 Bom., p. 404; *Visvalinga v. Palaniappa*, 1 L. R., 21 Mad., 1.

the mortgagee shall be accountable for all the rents and profits during his possession, the debtor, on the other hand, being liable to such extent as the mortgagee's claim for principal or interest may not be satisfied by the same. However, possession coupled with the right of taking the profits in satisfaction of a debt does not necessarily import a mortgage. It may be referable to some other cause, as where a *samudayam* or manager was appointed under a document worded as follows:—"You are appointed *samudayam* and we have received from you a *kanam* of 18,000 fanams on the *devasam* properties: you are to appropriate from the rents 1,800 paras for interest on the money due to you . . . and with the balance defray the expenses of the *devasam* and keep the accounts." It was held that, as there were no words indicating an intention to demise the property on *kanam* or otherwise transfer it, the relation of mortgagor and mortgagee was not established, at the same time the trustees of the *devasam* might be under an obligation to repay the debt before determining the power to collect the rents.¹ Actual possession is not required to give the mortgagee a complete title, but the conferring of the right of entry is a transfer of an interest in the property.² If the mortgagee is not put in possession, he is at liberty to sue for possession³ or he has his remedy against the mortgagor personally under section 68 (c). In the following case it was however considered that there was no mortgage or charge because the instrument did not on the date of its execution take effect on the land but created only the possibility of a charge arising at a future date. The instrument, dated July 1881, was in substance as follows:—"Whereas I have borrowed Rs. 99 from Madho Misser, I shall pay interest at the rate of one rupee per month. I shall pay the entire principal with interest in the month of April 1882. If I do not pay, then I declare in writing that I shall lose my right to one bigha seven cottas of guzashta land situated in mauza Kusba. If I do not pay money according to the promise, then the aforesaid Misser shall take possession of the land. Since the Misser shall take possession of the land, no interest of the money shall be paid by me and he shall pay the rent of the landlord out of the profits without any objection." The point actually decided was that Madho Misser was not entitled to sue for a sale of the land.*

Of the mortgages, in which the terms are such that no accounting is necessary when the time comes for redemption, there are several

¹ Krishnan v. Veloo, I. L. R., 14 Mad., 301.

² Motiram v. Vitai, I. L. R., 12 Bom., 100.

³ Dulli v. Bahadur, 7 N. W. P., 55; Ishan Chundra v. Sujan, 7 Beng. L. R., 14.

* Madho Misser v. Sidh Binaik, I. L. R., 14 Cal., 637.

instances. The Malabar *otti* and *kanam*,¹ the Canarese *iladarawara*,² the *zur-i-peshgi* and *bhogbunduk*³ of Bengal are among them, the Welsh mortgage is another.⁴ In the case of what is called the *vivum vadium* the so-called mortgagee receives the profits and pays himself principal as well as interest. In these cases the mortgagee looks to the land only, and has no claim against his mortgagor personally. Neither foreclosure

nor redemption, strictly so called, is possible.⁵ With *Zur-i-peshgi leases.* the *zur-i-peshgi*, as with other such mortgages, the terms frequently are that, while a certain sum is fixed as the rent, a part of it is retained in lieu of interest by the mortgagee, and the rest either paid by him to the mortgagor, or also retained in reduction of the principal.⁶ On the mortgagor seeking to redeem, there would in such cases be no necessity for taking accounts in the ordinary way as to the rent and profits. He would simply have to pay the principal or so much of it as might remain due after giving him credit for the sums retained in the manner described.⁷

To transactions of this class of a date prior to the repeal of the Regulations XV of 1793, XXXIV of 1803 (Bengal), and XXXIV of 1802 (Madras)⁸ those Regulations must still be applied. The intention of those Regulations was to limit the interest on money and to prevent an usufructuary mortgage from being made the indirect means of securing the equivalent of a higher rate of interest than that allowed by law. Under the Regulations, the mortgagee in possession might be compelled to account for the gross receipts, and was allowed interest at a rate not higher than 12 per cent. per annum. Notwithstanding the terms of the contract;—

“The mortgage-possession, instead of enduring by title for the stipulated time was made liable to abridgment by satisfaction from the usufruct, and a claim to

1 *Kumini v. Parkam*, 1 Mad. H. C., 261.

2 *Periathail v. Mankude*, 1 L. R., 4 Magl., 113.

3 *Ishan Chandra v. Sujan*, 7 Beng. L. R., 14; see *Chathu v. Kunjan*, 1 L. R., 12 Mad., p. 112.

4 See *Dorappa v. Kundakuri*, 3 Mad. H. C., 368, 365.

5 Fisher on Mortgages, 4th ed., p. 5; Venkateshwara v. Kesava, 1 L. R., 2 Mad., 187; Tiragnana v. Nallatambi, 1 L. R., 16 Mad., 489; see *Setrucher's v. Vairicherla*, 1 L. R., 2 Mad., 315; Soorjun Chowdhry v. Imambandee, 12 W. R., 527.

6 *Shoe Golan v. Roy Dinkur*, 12 W. R., 215. See description of *zur-i-peshgi* lease in Tagore Lectures, 1877, p. 224; *Mashook v. Marem Reddy*, 8 Mad. H. C., 31; see *Juggeewandas v. Ramdas*, 2 Moo. I. A., 487.

7 See section 62 and note, and *Ishan Chandra v. Sujan*, 7 Beng. L. R., 14; *Ven-catachellam v. Tirumala*, 2 Mad. H. C., 289.

8 The Bengal Regulations are repealed by Act XXVIII of 1855, which came into force on the 1st January 1856, the Madras Regulation by Madras Act II of 1869

"interest arose in some cases where it did not exist before. The perception of the profits in many cases did not constitute receipt of interest, but was in lieu of any."

The determination of a rent beforehand by agreement did not prevent the mortgagor from calling for an account, and the fact that a fixed period of enjoyment had been assigned to the mortgagee did not prevent redemption before the expiration of it. In a case where the Court held that it was essentially necessary for the defendant, holding under an *iladarawaru* mortgage, that he should have possession till the end of the term, in order that he should make such profit as would represent the interest on the loan and a return for his industry and expenditure on the land, it was ruled that the Regulation was not applicable, and the plaintiff's suit to redeem before the expiration of the term was dismissed.² In a later case, which it might be difficult to distinguish, the Court took another view of the transaction and held that it came within the purview of Reg. XXXIV of 1802.³ Where in the case of a mortgage of *malikana*, amounting to Rs. 2,221, the document provided that the mortgagee was to credit Rs. 1,656 of this amount as interest at 12 per cent. every year, and to take the remainder Rs. 565 as his own collection-fee and for other expenses, and it was found that this sum of Rs. 565 was *bonâ fide* agreed to be allowed to the mortgagee for the expense and risk of collection, and that no evasion of the law or usurious contract was intended, the Privy Council refused to allow the plaintiff in a redemption suit to insist on accounts being rendered by the mortgagee under sections 9 and 10 of the Reg. XXXIV of 1803.⁴ The operation of the Regulation is not affected by the circumstance that the suit is brought after the present Act came into force. Therefore when the plaintiff in a suit of 1884 sought to recover property held under a mortgage of 1846 whereby it was arranged that the mortgagee should have possession and enjoy the profits, until the principal sum was paid, in lieu of interest, and alleged that the principal amount and interest at 12 per cent. had been more than satisfied from the profits, it was held that the plaintiff would on proving that allegation be entitled to redeem.⁵

Note 5. (e) In an English mortgage there is a conveyance by the debtor of his property to his creditor, and a covenant to pay the debt within a certain time, *English mortgage.*

1 *Shah Mukhlun Lall v. Baboo Kishon Singh*, 12 Moo. I. A., p. 190; see *Mahtab Kuar v. Collector of Shahjahanpur*, I. L. R., 5 All., 419; *Hunoomanpersaud v. Mussumat*, 6 Moo. I. A., 393.

2 *Pelathail v. Mankude*, I. L. R., 4 Mad., 113.

3 *Tippayya v. Venkata*, I. L. R., 6 Mad., 74.

4 *Badri Prasad v. Marlidhar*, I. L. R., 2 All., 593.

5 *Samar Ali v. Karim-ul-lah*, I. L. R., 8 All., 402.

generally six months, and a proviso that on this condition being fulfilled, the property shall be re-conveyed by the mortgagee to the mortgagor. According to the contract, the mortgagee becomes possessed of the legal estate, subject only to a condition which must in order to take effect be performed within a given time. What is called the equity of redemption is the right of the mortgagor to recover the legal estate, notwithstanding the terms of the condition and after the expiry of the time allowed for payment.* While the debtor has this right of redemption which he may exercise at any time within the period allowed by limitation, the creditor has, on the other hand, the right of compelling him to exercise it or for ever to be precluded from doing so, in other words, the right of foreclosure, and further under a power, generally given in express terms for that purpose, the right of selling the mortgaged property. The relation of the mortgagor and mortgagee under an English mortgage resembles that of the parties to a *bye-bil-wufa* as governed by the Bengal Regulations. While it is not essential to the mortgagee's title that he should take possession, the possession of the mortgagor as long as he asserts only a title to redeem "must *prima facie* be perfectly "reconcilable with and not adverse to the title of the mortgagee and the "continuation of his lien."¹ In an English mortgage the possession usually remains with the mortgagor, and sometimes there is an express covenant that he shall remain in possession for a certain time which operates as a re-demise in his favour; but in the absence of such covenant the mortgagor is a mere tenant-at-sufferance liable to be ejected at any time without notice and without any claim to rent accruing due or in arrears, or to the growing crops.²

"His position being that of a person acquainted with the imperfection of his title and one entirely of his own choosing, seems to us to fall under quite a different principle from that of a tenant-at-will cultivating on a reasonable expectation of reaping what he has sown or of a holder whose right is put an end to by a wholly uncertain event."³

A person who comes in as tenant under a mortgagor can be in no better position, and is equally liable to be ejected, though he may have had no notice of the mortgage. One tenant-at-sufferance cannot make another.⁴ If a mortgagee having exercised his power of taking

1 Prannath Roy v. Rookea Begum, 7 Moo. I. A., 323; Mankes Koor v. Sheikh Munnoo, 14 Beng. L. R., 315, distinguishing Anundo Moyee v. Dhondro, 14 Moo. I. A., 101; see too Durga Prasad v. Shambu Nath, I. L. R., 8 All., 80

2 Fisher on Mortgages, 4th ed., pp. 293, 406.

3 Land Mortgage Bank v. Vishnu, I. L. R., 2 Bom., p. 672; as to mortgagee's position see Ramalinga v. Samiappa, I. L. R., 13 Mad., 15.

4 See Keech v. Hall, 1 Smith's L. C., 9th ed., p. 546; and Underhay v. Read, 20 Q. B. D., 209; Towerson v. Jackson, [1891] 2 Q. B., 484.

possession afterwards allows the mortgagor to collect the rents, he is not prejudiced thereby except as against later incumbrancers of whose claims he has notice. Where the mortgaged property was attached by a creditor, and after the attachment the mortgagee who had been collecting the rents by a *mehta* or clerk allowed the mortgagor to receive them, the mortgagee was charged with the amount actually received by him prior to attachment and that which he might have received after attachment but for his wilful default. As to that amount he should be postponed to the attaching creditor, who was in the position of a subsequent incumbrancer.¹

The mortgagee having once taken possession is not at liberty to surrender it and have a receiver appointed.²

English mortgages have been in common use in the Presidency towns and among Europeans elsewhere in India. The Courts have accorded to the parties to such transactions the same rights as are recognized in English Courts, including the right of foreclosure by suit. In a recent Bengal case heard on appeal from the *mofussil*, it was objected that the mortgagee must proceed under the Regulation XVII of 1806. But the case was distinguished from the common case of *mofussil* mortgages by conditional sale on the ground that the parties were Europeans, and a decree was made for the sale of the property in the event of the debt secured not being paid within twelve months, and otherwise for a re-conveyance of the property to the mortgagee.³

English mortgages made between Hindus in the *mofussil* have been treated as mortgages by conditional sale, and therefore where the Regulation was in force proceedings on the mortgage had to be taken under the provisions of the Regulations.⁴

- [1] **59.** Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an

¹ *Juggeewandas v. Ramdas*, 2 Moo. I. A., 487; *Fisher on Mortgages*, 4th ed., p. 355; see section 76, note 2.

² *In re Prytherch*, 42 Ch. D., 590.

³ *Manly v. Patterson*, 1 L. R., 7 Cal., p. 398, see section 88.

⁴ *Shurnomoyee v. Srinath Das*, 1 L. R., 12 Cal., 614.

instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render [2] invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Commentary.

Note 1. In respect of form, apart from the cases where the principal money secured is under Rs. 100, or where there is such a deposit of title-deeds as the proviso intends, a written instrument signed, attested by two witnesses, and registered, is required. Save in the cases excepted, no mortgage of immoveable property executed after the 1st July 1882, is valid without a writing and without that writing being registered.¹ That the instrument, if one existed, should be registered the law of registration had already required, the penalty of non-registration being that the instrument could not affect the property comprised in it, nor be received as evidence of any transaction affecting such property. Where the principal money secured is under Rs. 100, registration remains optional,² but the instrument, if there is one, must be attested by two witnesses. In the case of a simple mortgage such an instrument is now indispensable, while other mortgages may be effected by delivery of possession of the property. It is the principal sum to which regard is to be had in ascertaining whether a registered instrument is essential. On the sections of the Registration Act, where reference is made only to the value of the interest in the property, a question has arisen as to how that value is to be estimated in the case of mortgages. But the result of the cases clearly is that the principal sum as it stands when the instrument is executed and independently of any possible accretions in the way of interest or otherwise, should be taken to represent the value of the mortgagee's interest.³ The circumstance that the money

¹ *Christachari v. Karibasayya*, I. L. R., 9 Mad., p. 420. The registration is invalid if the property is wrongly described; *Baij Nath v. Shoo Sahoy*, I. L. R., 18 Cal., 557; for general observations on the law of registration see note 3 to section 54.

² Section 40 determines the priority as between two such mortgages; see *Maganlal v. Shakra*, I. L. R., 22 Bom., 945.

³ *Ramdoolary v. Thacoer Roy*, I. L. R., 4 Cal., 61; *Korban Ally v. Sharada Proshad*, I. L. R., 10 Cal., 82; *Narasayya v. Guruvappa*, I. L. R., 1 Mad., 378; *Kattamuri Jagappa v. Padalu Latchappa*, I. L. R., 5 Mad., 119; *Sadagopa v. Dorasami*, ib., 214; *Nana bin Lakshman v. Anant Babaji*, I. L. R., 2 Bom., 353; *Nago Kunatuma v. Babaji*, I. L. R., 8 Bom., 611; *Habibullah v. Nakshed*, I. L. R., 5 All., 447.

is not repayable for a certain period on the expiration of which it would with interest necessarily exceed Rs. 100, is not, as was held in some of the cases, material.¹ Attestation being required, it follows that the execution of the document must be proved by an attesting witness, unless execution is admitted or the witnesses cannot be found, or deny, or have forgotten the fact of execution (Evidence Act, sections 68-71). But it has been held in Allahabad that 'it is sufficient to call the writer of the document whose name appears upon it, though not described as an attesting witness.'² In the absence of registration, when registration is compulsory, an instrument purporting to be a mortgage cannot affect any immoveable property comprised therein or be received as evidence of the transaction affecting such property (Registration Act, section 49). But such a document when containing a personal covenant to pay is admissible in an action to enforce the personal obligation.³ In the absence of attestation by two witnesses the instrument, although ineffectual as a mortgage, may still be admissible in evidence to establish a charge on the property on the principle that effect should if possible be given to a legal intention clearly expressed.⁴ It will be understood that neither this section nor the provisions of the Registration Act apply if, instead of a charge actually created, there is only an agreement of which specific performance may be obtained.⁵

Note 2. The effect of the proviso seems to be that an equitable mortgage by deposit of title-deeds will be recognized, only when made in the towns named; whereas according to the view adopted in Allahabad such deposit made before the Act came into force was equally valid in places outside those towns.⁶ There is nothing however to prevent such a mortgage including lands outside the limits of those towns as in the case of *Varden Seth Sam v. Luckpathy*.⁷ A deposit of title-deeds with a creditor is generally said to operate as evidence of an agreement to execute a

1 *Haibullah v. Nakhed*, I. L. R., 5 All., 447, overruling *Himmat v. Sewa Ram*, I. L. R., 3 All., 157; *Parshan v. Hanwanta*, I. L. R., 1 All., 274; *Ranno v. Pir Muhammad*, I. L. R., 2 All., 688.

2 *Radha Kishen v. Fateh Ali*, I. L. R., 20 All., 532.

3 *Ulfatunissa v. Hosain Khan*, I. L. R., 9 Cal., 520; *Vani v. Bani*, I. L. R., 20 Bom., 553; *Gomaji v. Subbarayappa*, I. L. R., 15 Mad., 29; *Madras Deposit Society v. Oonnamalai*, I. L. R., 18 Mad., 29, an authority the other way, seems questionable.

4 See Lindley's notes to Tibbaut, p. liii.

5 *Appasami v. Manikam*, I. L. R., 9 Mad., 103; see *ante* p. 141 and next note.

6 *Himalaya Bank v. Quary*, I. L. R., 17 All., 252.

7 9 Moo. I. A., 303; *Jivandas v. Framji*, 7 Bom. H. O., (O. C.), 45; *Manekji v. Rustomji*, I. L. R., 14 Bom., 269; *Madho Das v. Ram Kishen*, I. L. R., 14 Cal., 238.

mortgage in his favour and is valid against all who cannot prove themselves to be *bond fide* purchasers for value.¹ There must, in order to constitute a mortgage, be some evidence to show how the deposit came to be made; for mere possession of deeds, without evidence of the contract originating it, does not create any security.² It must also appear that money either was or already had been advanced when the deposit took place, and then it is not material that the title-deeds were deposited for the purpose of having a mortgage executed.³ The deposit may be made upon an agreement that it shall cover future advances as well as the first advance, or on a subsequent advance being made it may be agreed that the deposit shall stand security for it as well as past advances.⁴ It will not suffice that, where a third person is in possession of the title-deeds for some other purpose, a communication is made by the owner of the property purporting to make such third person a trustee of the deeds for a creditor.⁵ Nor is an equitable mortgage created when deeds are deposited before any money is advanced with a view to prepare a future mortgage, and there is no express agreement that they shall stand as a security for future advances until a legal mortgage is executed.⁶ It is not necessary that all the title-deeds should be deposited.⁷ Nor is it necessary that there should be any writing, and if there is a writing which merely records the deposit and the purpose for which it was

Registration.

made, registration is not required. For instance, when the borrower, while depositing the title-deeds and receiving a loan upon them or subsequently, writes a letter or memorandum stating what he has done and the terms of the loan, such writing, while admissible in evidence to prove the facts stated, does not constitute the contract between the parties. Still less can it be said that the creditor's lien is created by the writing, for the equitable mortgage is constituted by the agreement evidenced by the loan and the deposit of the deeds.⁸ The writing does not therefore belong to the class of documents which require registration. On the other hand, if

1 See *Shaw v. Foster*, L. R., 5 H. L., 340.

2 *Dixon v. Muckleston*, L. R., 8 Ch., 155.

3 *Dayal v. Jivraj*, I. L. R., 1 Bom., 237; *Himalaya Bank v. Quarry*, I. L. R., 17 All., 252.

4 *Govindro Coomar v. Kumud*, I. L. R., 25 Cal., 611; *Robbins' Law of Mortgages*, p. 60.

5 *In re Bætham*, 18 Q. B. D., 380.

6 *Jaitha Bhima v. Haji Abdul*, I. L. R., 10 Bom., 634.

7 *Fisher on Mortgages*, 4th ed., p. 52.

8 *Kedarnath v. Shamloll*, 11 Beng. L. R., 405; *Jivandas v. Framji*, 7 Bom. H. C., (O. C.), p. 62; *Oo Nong v. Moug*, I. L. R., 13 Cal., 322; *Meek v. Bayliss*, 31 L. J., Ch., 448; and see *Ex parte Hubbard*, 17 Q. B. D., 690.

the writing contains a contract for a mortgage of the property the title-deeds of which have been deposited, and a mortgagee's suit is instituted upon the strength of it, such writing can only be admissible in evidence and operative if it is registered.¹ As a mere contract to grant a mortgage, the writing would not need to be registered any more than a contract for sale; but if the creditor claims to have the contract treated as constituting a mortgage, registration is as much required as if there had been an actual completed mortgage.² A mortgage by deposit of deeds is a complete act and not an executory agreement. Section 48 of the Registration Act is therefore inapplicable to such a transaction. The holder of a registered instrument does not by virtue of that section take priority against an equitable mortgagee by deposit of title-deeds.³ The mortgage avails against all persons who are not purchasers for value and without notice; and it lies upon him, who seeks to defeat the charge, to prove that he purchased without notice and in good faith.⁴ It matters not, however, that a second or subsequent purchaser had notice at the time of his purchase, provided that the original purchaser had no notice. "The *bonâ fide* purchaser of an estate for valuable consideration "purges away the equity from the estate in the hands of all persons who "may derive title under it, with the exception of the original party whose "conscience stands bound by the meditated fraud. If the estate becomes "re-vested in him, the original equity will attach to it in his hands."⁵

The Act makes no provision for the remedy which the equitable mortgagee is to have. According to the English practice the proper remedy of such a mortgagee is a suit for foreclosure,⁶ and this practice has been followed in Bombay, article 147 of the schedule to the Limitation Act being accordingly held applicable.⁷ In Calcutta, however, as also in Madras the practice has been to decree a sale.⁸ The mortgagor has his remedy by suit for redemption and cannot maintain an action in detinue to recover the title-deeds.⁹

1 *Neve v. Pennell*, 38 L. J., Ch., p. 22; see *Kedarnath v. Shamloll*, 11 Beng L. R., p. 414.

2 See *Ex parte Mackay*, L. R., 8 Ch., 643, 648; *Ganpat v. Adarji*, I. L. R., 3 Bom., p. 329.

3 *Coggan v. Pogosé*, I. L. R., 11 Cal., 158.

4 *Dayal v. Jivraj*, I. L. R., 1 Bom., 237.

5 *Id.*, p. 247, see too *Le Neve v. Le Neve*, 2 W. & T. L. C., 6th ed., p. 26.

6 *Fisher on Mortgages*, 4th ed., p. 787; *James v. James*, L. R., 16 Eq., 153; *Marshall v. Shrowsbury*, I. L. R., 19 Ch., 254.

7 *Manekji v. Rustomji*, I. L. R., 14 Bom., 269; *Khushal v. Punanchand*, I. L. R., 22 Bom., 167.

8 *Srinath Roy v. Gadadhur*, I. L. R., 24 Cal., 318.

9 *Bank of New South Wales v. O'Connor*, 14 App. Cas., 273.

Rights and Liabilities of Mortgagor.

60. At any time after the principal money has become [1]
 payable, the mortgagor has a right, on
 Right of mort-
 gator to redeem. payment or tender, at a proper time and
 place, of the mortgage-money, to require the mortgagee
 (a) to deliver the mortgage-deed, if any, to the mortgagor,
 (b) where the mortgagee is in possession of the mortgaged
 property, to deliver possession thereof to the mortgagor,
 and (c) at the cost of the mortgagor either to re-transfer
 the mortgaged property to him or to such third person as
 he may direct, or to execute and (where the mortgage has
 been effected by a registered instrument) to have registered
 an acknowledgment in writing that any right in derogation
 of his interest transferred to the mortgagee has been extin-
 guished :

Provided that the right conferred by this section has [2]
 not been extinguished by act of the parties or by order of
 a Court.

The right conferred by this section is called a right to
 redeem, and a suit to enforce it is called a suit for redemp-
 tion.

Nothing in this section shall be deemed to render [3]
 invalid any provision to the effect that, if the time fixed for
 payment of the principal money has been allowed to pass
 or no such time has been fixed, the mortgagee shall be
 entitled to reasonable notice before payment or tender of
 such money.

Nothing in this section shall entitle a person interest- [4]
 ed in a share only of the mortgaged pro-
 portion of mort-
 gaged property. perty to redeem his own share only, on
 payment of a proportionate part of the
 amount remaining due on the mortgage, except where a
 mortgagee, or, if there are more mortgagees than one, all
 such mortgagees, has or have acquired, in whole or in part,
 the share of a mortgagor.

Commentary.

This section, which it will be observed is not prefaced with the words "in the absence of a contract to the contrary," explains what is involved in the right of redemption. That right is one which is favoured by equity in this sense, that the Courts will not enforce any agreement which operates to prevent redemption or is oppressive or unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage. Thus in an Irish case a lease by the mortgagor to the mortgagee for a long period at a fixed rent was set aside.¹ Similarly in Bombay the Court refused to enforce against the mortgagor a condition that the mortgagee should, notwithstanding redemption, remain in possession as a perpetual tenant at a fixed rent.² The same Court, following English authority, has recently held that a stipulation in the mortgage that the mortgagor only should be entitled to redeem was invalid, and therefore afforded no defence to the mortgagee in answer to a suit for redemption brought by an assignee of the mortgagor.³ An *ottidar* in Malabar has a right of pre-emption and therefore cannot be redeemed by a purchaser of the *jenn* or proprietary interest, without an opportunity being given to him to exercise his right of pre-emption.⁴ In the case of an *iladaravara* mortgage, a condition that the mortgagor should on redemption repay the principal in kind at a rate which would give the mortgagee, at the current market price, treble the amount of his original advance, was held unreasonable and the Court refused to give effect to it.⁵ An agreement, expressed in general terms, to the effect that redemption shall be postponed until all debts due from the mortgagor to the mortgagee are paid off, ought not to be enforced against the mortgagor, inasmuch as it would necessarily embarrass him in the exercise of the equity of redemption.⁶ On the other hand, there is nothing inequitable in a stipulation making the equity of redemption conditional on the re-payment of an existing debt other than the mortgage debt or of further advances. At least as between the mortgagor

1 Webb v. Rorko, 2 Sch. & Lef., 661; Salt v. Northampton, [1892] App. Cas., 1; see Fisher on Mortgages, 4th ed., pp. 231 and 685—687.

2 Mahomed v. Jijibhai, I. L. R., 9 Bom., 524; Subrao v. Manjapa, I. L. R., 16 Bom., 705.

3 Trimbak v. Sakharain, I. L. R., 16 Bom., 599; see Fisher on Mortgages, 4th ed., p. 686; Sayad Abdul Hak v. Gulam Jilani, I. L. R., 20 Bom., 677.

4 Ukkur v. Kutti, I. L. R., 15 Mad., 41.

5 Mailaraya v. Subbaraya, J. Mad. H. C., 81.

6 Rama v. Martand, I. L. R., 9 Bom., p. 236 note, explained in Yashvant v. Vithoba, I. L. R., 12 Bom., p. 234.

and the mortgagee such an agreement, postponing the exercise of the right of redemption, can be enforced, although no charge may be created in respect of the debts which it is thus stipulated that the mortgagor should pay off.¹ In circumstances in which a mortgage by deposit of title-deeds is legally possible, an agreement that the person already in possession of the deeds under a mortgage executed in his favour shall hold them as security for further advances is sufficient to create an equitable mortgage.² Where in a mortgage with possession it was agreed that the mortgagee should in lieu of interest and principal enjoy the land for twenty-five years and after the expiration of that time deliver up the same, and it was further stipulated that meanwhile the mortgagor should not claim the land unless he paid the principal and interest that might accrue due from the date of the bond, it was held that the stipulation was not of a penal character. The mortgagor had an option, and if he chose to redeem the land before the expiry of the period, he could do so, only on the terms of paying a proportionate part of the principal and of the interest. If the mortgagee had been in possession for two years out of the twenty-five, he would thus have to give credit for two twenty-fifths of the principal and two years' interest, while for the principal and interest for the remaining twenty-three years, the mortgagor would be liable.³

The general rule that a mortgagee can bargain only for his principal, interest and costs does not permit him to stipulate for professional charges payable to himself, *e.g.*, as auctioneer or solicitor.⁵ But apart from cases in which the mortgagor can claim relief on the ground of fraud, undue influence, or the like, a stipulation for payment of compound interest in a given event is legal and enforceable.⁶ In *Potter v. Edwards*⁷ the mortgage was expressed to be for £1,000 with interest at 5 per cent. and a receipt for that sum was signed; but in fact £700 only was paid and the balance stood for, a bonus allowed on

1 *Hari Mahadaji v. Balamhat*, I. L. R., 9 Bom., 233; *Yashvant v. Vithoba*, I. L. R., 12 Bom., 231; *Gundar Malhar v. Bagenji*, I. L. R., 18 Bom., 755; *Chhotalal v. Mathur*, *ib.*, 591; *Krishnaji v. Maheswar*, I. L. R., 20 Bom., 346.

2 *Allu Khan v. Roshan*, I. L. R., 4 All., 85; *Tajjo Bibi v. Bhagavan*, I. L. R., 16 All., 297; see sections 61, 79 and 80 and cases there cited.

3 *Girendro v. Kumud Kumari*, I. L. R., 25 Cal., 611.

4 *Bapuji v. Satyabhamabai*, I. L. R., 6 Bom., p. 494.

5 *Field v. Hopkins*, 44 Ch. D., 524; but as to vakil and client see *Sayad Aldul Hak v. Gulam Jilani*, I. L. R., 20 Bom., 632.

6 *Surya Narain v. Jogendra*, I. L. R., 20 Cal., 360; see section 86 note on interest

7 26 L. J., Ch., 468.

account of the riskiness of the security. It was held that the whole £1,000 must be paid before the mortgage could be redeemed. This case was followed in *Mainland v. Upjohn*,¹ where it is explained that such a transaction is equivalent to the payment of the whole sum and the repayment out of it of the bonus. Assuming that the parties are on equal terms, one not at all under the influence of the other, both bargaining and knowing perfectly well what they are about, Kay, J., observes, money so paid over cannot legally be claimed back, nor can a mortgagor say to the mortgagee in such a case, "Though I have paid you that money and agreed that it should be received by you as a consideration for the advance you have made me, I will strike it out of the mortgage account."

Note 1. First with regard to the time when the right accrues. It is after the principal money has become payable and on payment or tender of the mortgage-money at a proper time. Generally the right to redeem and the right to foreclose are co-extensive, and when a day is fixed for payment the mortgagor is not at liberty to insist on redemption before that day, even although he may tender interest up to that day. Nor, on the other hand, can the mortgagee insist on the enforcement of his rights at an earlier date.² Where a mortgage, dated July 1886, provided that the principal should be paid in July 1890 and that meanwhile interest at 8 per cent. should be paid annually and on default at the rate of 9 per cent., it was held that having regard to the terms of the instrument no suit for sale or other relief could be brought before the due date.³

The question whether the mortgagor may redeem before the expiration of the given term has to be answered by ascertaining the intention of the parties from the language of the instrument. Although the mortgagor cannot contract himself out of his right to redeem, he may bind himself by a stipulation that during a certain time the estate shall remain irredeemable; provided that the intention so to postpone the exercise of the right of redemption is clearly expressed,⁴ and provided that the right on the mortgagee's part is similarly limited, for otherwise the stipulation would be without consideration and therefore

¹ 41 Ch. D., 126; see *Biggs v. Hoddinott*, [1898] 2 Ch., 307, where the cases are discussed and explained.

² *Brown v. Colo*, 14 Sim., 427; *Sakharam v. Vitto*, 2 Bom. H. C., 237; *Tirugnana v. Nallatambi*, 1 L. R., 16 Mad., 487; *Sayad Abdul Hak v. Gulam*, 1 L. R., 20 Bom., 677.

³ *Kannu v. Natesa*, 1 L. R., 14 Mad., 477.

⁴ *Fisher on Mortgages*, 4th ed., p. 685; *Marana v. Pendyala*, 1 L. R., 8 Mad., 230.

void.¹ And generally, as has been observed, the right to foreclose does not arise till the accrual of the right to redeem. In the case of a mortgage made for a term of years, redeemable however at fixed shorter periods, the mortgagor can only redeem at the end of such period on payment, tender, or deposit of the mortgage-money then due.² The intention however to postpone to a distant day the payment of the debt and the right to redeem must be clearly expressed. Where the document, after giving a usufructuary mortgage for a term of twenty-two years, concluded with a clause to the effect that the land should be given up to the plaintiff on his paying the principal and interest at any time within two months of the execution of the document, it was held that the plaintiff might, though he had not tendered the money within the two months, redeem before the expiration of the term of twenty-two years.³ And in another case the plaintiff being indebted to the defendants in a sum of Rs. 6,538 let the defendants into possession of certain land on a fixed annual rent of Rs. 298 for a term of fifty-five years, it being agreed that the defendants were to pay annually Rs. 169 and retain the balance, *viz.*, Rs. 129, in liquidation of the debt. In this way the debt would have been liquidated in the fifty-five years during which the defendants might enjoy the rents and profits. It was held that the transaction was a usufructuary mortgage and redeemable on the usual terms before the expiration of the agreed term.⁴ The reasons for this decision are not clear. Referring to the decision in *Dorappa v. Kundakuri* the Madras High Court in a more recent case decided however before the Act came into force, laid down the law as follows⁵ :—

“Where a day is fixed for the payment of a debt and nothing more appears, the presumption is that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period; and in like manner where the mortgage is created as a mere security for the sole purpose of ensuring the payment of the debt at a certain date, we are not prepared to say that the debtor may not discharge the debt and put an end to the security at an earlier date; but when the continuance of the enjoyment of the property for a term forms a material part of the contract, it would be inequitable to deprive the mortgagee of the right on

1 *Sayad Abdul Hak v. Gulam*, I. L. R., 20 Bom., 684; *Sari v. Motiram*, I. L. R., 22 Bom., 375.

2 *Hewanchal v. Jawahir*, I. L. R., 16 Cal., 307.

3 *Dorappa v. Kundakuri*, 3 Mad. H. C., 363; see *Marana v. Pendyala*, I. L. R., 3 Mad., 230.

4 *Mashook v. Marem Reddy*, 8 Mad. H. C., 31; disapproved in *Keshava v. Keshava*, I. L. R., 2 Mad., 45. According to the English cases it seems that the term for which redemption may be postponed should not exceed seven years, see *Teevan v. Smith*, 20 Ch. D., 724.

5 *Setrucherla v. Vairicherla*, I. L. R., 2 Mad., 314.

"the mere ground that the contract was one of mortgage. Where parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, but the creation of a term is by no means conclusive on this point. It may be apparent from the express terms of other conditions of the contract or by implication that the parties intended that redemption should be allowed at an earlier period, as for instance, when the debt had been discharged in a manner contemplated by the parties, and the purpose for which the term had been created, thus satisfied; and this is apparently the ground on which the decision in *Dorappa v. Kundakuri* proceeded."

In the case whence this passage is cited, the agreement was that the plaintiff, being creditor to the amount of Rs. 120, should hold possession of the land for a term of nineteen years at a yearly rent of Rs. 13, and that this rent should be applied to the liquidation of the principal and of a like sum of Rs. 120 agreed to be taken for interest, a small balance being left which should be paid to the plaintiff.¹ In the Malabar *otti* or *kanam* possession for the term of twelve years is an implied term of the contract, unless by express stipulation a different period is given. There is in fact a lease of the land for that period on the expiration of which the land may still be held as security for the advance.² Where in a document described as a *kanam*, there was a clause that the land was to be surrendered "whenever the amount advanced is ready," it was held, notwithstanding, that the mortgagor was not entitled to redeem before the expiration of the usual period.³ In a Bombay case, where the stipulation was that the mortgagor should pay the debt within ten years and redeem the property, his suit for redemption brought within seven years of the mortgage was held to be rightly dismissed as premature.⁴ This decision is referred to with approval in an Allahabad case, where the suit was dismissed for the same reason. There the promise was to pay the interest every year and the principal in ten years.⁵ In a later case in the same Court, Mahmood, J., while approving the statement of law above cited from the Madras case, disapproves the judgment of Westropp, C.J., in the Bombay case last mentioned as, in his opinion, laying down too rigidly the principle that foreclosure and redemption are co-extensive in the absence of any stipulation to the contrary.⁶

1 See a similar case, *Soorjun Chowdhry v. Inambandee*, 12 W. R., 527.

2 *Edathil v. Kopashon*, 1 Mad. H. C., 122; *Keshava v. Keshava*, I. L. R., 2 Mad., 45.

3 *Kanara v. Govindan*, I. L. R., 5 Mad., 310.

4 *Vadju v. Vadju*, I. L. R., 5 Bom., 22; approved in *Tirugnana v. Nallatambi*, I. L. R., 16 Mad., 486; in this latter case there was no term fixed and the mortgage was deemed to be in the nature of a *vivum vadum*.

5 *Raghubar v. Budhu Lal*, I. L. R., 3 All., 95.

6 *Bhagwat v. Parshad*, I. L. R., 10 All., 602.

The payment or tender, on the making of which the right of redemption accrues, must, of course, conform to the rules generally applicable to such acts. See section 84 as to tender and deposit, and the effect thereof. If there are several joint-mortgagees payment to one is a good discharge against all in India,¹ but not so in England.² And here in the case of an English mortgage the question may arise whether the reconveyance to the mortgagor must not be executed by all the mortgagees.

Although a mortgagor cannot obtain the relief to which he may be entitled under this section, except on payment of *Redemption suit.* the mortgage-money, a suit for redemption is not dismissed because the money has not been paid or even tendered. In strictness the mortgagor, seeking to redeem, ought to be ready with the full sum due; but it has not been the practice to dismiss suits in which a larger sum than that tendered is ultimately found to be due.³ There may be uncertainty or dispute as to the exact amount due, and for ascertaining it the taking of an account as provided in section 92 may be necessary. It is not even essential that the plaint should contain an offer to redeem. But if the suit be solely for purposes inconsistent with redemption, for instance, if the plaintiff seeks only to set aside the mortgage, or suing simply in ejectment is met by the averment of a mortgage, the suit cannot properly be converted into a suit for redemption, at least without the consent of the defendant.⁴ When, however, admitting the mortgage the plaint also declares that it has been satisfied and prays for an account of the profits received by the mortgagee, relief by way of a redemption-decree may be given, if on the findings of fact it becomes necessary.⁵ A plaintiff, who frames his suit on the mistaken supposition that the mortgage is paid off, is still entitled to a decree made conditional on his payment of such sum as may, on the accounts being taken, be found due.⁶ The plaintiff seeking to redeem must

1 *Bhup Singh v. Zain-ul-Abdin*, I. L. R., 9 All., p. 209; *Barbu v. Ramana*, I. L. R., 20 Mad., 461.

2 *Steeds v. Steeds*, 22 Q. B. D., 537.

3 *Baradakant Rai v. Bhagwan Das*, I. L. R., 1 All., 344; *Sahib Zadah v. Parmeshar*, ib., 524; *Mokund Lall v. Goluck Chunder*, 9 W. R., 572; see also cases in note 1, section 62; see however *Nawab Azimat Alikhan v. Jowahir Sing*, 13 Moo. I. A., p. 412.

4 *Chandu v. Kombi*, I. L. R., 9 Mad., 208; *Lakshman v. Hari Dinkar*, I. L. R., 4 Bom., p. 588; see *Narayan Venkoba v. Pandurang*, I. L. R., 7 Bom., 526.

5 *National Bank of Australasia v. United Hand in Hand Co.*, 4 App. Cas., 391; *Fisher on Mortgages*, 4th ed., 674; see *Sankana d. Virupakshapa*, I. L. R., 7 Bom., 146. Under the *Dekkhan Agriculturists' Relief Act*, a suit for an account without prayer for redemption is admissible, *Laluchand v. Girjappa*, I. L. R., 20 Bom., 469.

6 *Mokund Lall v. Goluck Chunder*, 9 W. R., 572.

declare and prove his title, for against persons not so entitled, the mortgagee may hold the property.¹ The persons other than the mortgagor entitled to redeem are enumerated in section 91. It has been held to be sufficient that the plaintiff should prove his title at the hearing, and so the purchaser of the equity of redemption, sold in execution of a decree, who had paid the price but had not obtained a certificate at the time when the suit was brought, was nevertheless held entitled to a decree for redemption, having meanwhile obtained the certificate.² It is incumbent on the plaintiff, alleging that the defendant holds under a specific mortgage, to prove that mortgage,³ and further that the plaintiff has a subsisting right to redeem.⁴ But in cases where the plaintiff has failed to prove the mortgage sued on and the defendant has admitted a mortgage of a different date, the Courts have permitted the plaintiff to redeem on the footing of the admitted mortgage,⁵ and where a mortgage executed in consolidation of prior mortgages is invalid or incapable of proof, the plaintiff may fall back on the prior mortgages.⁶

As between persons who become interested in the equity of redemption by purchase, mortgage, or otherwise, the rule is that they rank according to priority in time. The first purchaser of the equity of redemption does not lose his priority by omitting to give notice to the mortgagee. His right would, therefore, prevail against that of a subsequent incumbrancer.⁷ It was thus held that the mortgagee, who, after the right of redemption had been sold to the plaintiff, made advances on the security of the property, could not compel the purchaser who sought to redeem to pay off those advances. If however the plaintiff by his conduct allowed the defendant to make further advances to the original mortgagee under the supposition that he was still owner of the right of redemption, the defendant might thereby acquire a better equity.⁸

1 Fisher on Mortgages, 4th ed., 673.

2 Krishnaji v. Gauresh Bapuji, I. L. R., 6 Bom., 139; Pearce v. Morris, L. R., 5 Ch., 227.

3 Govindrav v. Ragho Deshmukh, I. L. R., 8 Bom., 543.

4 Parmanand v. Sahib Ali, I. L. R., 11 All., 438; Kishen Dutt v. Norendar, L. R., 3 I. A., 85.

5 Unieha Kandyib v. Valia, 4 Mad. H. C., 366; Unnian v. Rama, I. L. R., 8 Mad., 415; Krishna Pillai v. Rangasami, I. L. R., 18 Mad., 462; Lakshman v. Hari Dinkar, I. L. R., 4 Bom., 584; Chinnaji v. Sakharam, I. L. R., 17 Bom., 365.

6 Arumugam v. Periasami, I. L. R., 19 Mad., 160.

7 Sugdon's Vendors and Purchasers, 14th ed., p. 380; Wilmot v. Pike, 5 Hare, 14; see notes to sections 46 and 78.

8 Govindrav v. Ravji, I. L. R., 12 Bom., 33; see ante p. 98.

When entitled to redeem, there are three things which the mortgagor may demand. *Firstly*, he may demand the return of the mortgage-instrument and, it may be added, of all other title-deeds in the possession or power of the mortgagee relating to the mortgaged property, which documents except on an offer to redeem, the mortgagee is not bound to deliver up or except in a suit to which he is a party to produce on *subpoena*.¹ The necessity for the return of the title-deeds is obvious in view of the presumption that would otherwise arise against the discharge of the mortgage. *Secondly*, and necessarily when the mortgage is usufructuary, he may demand delivery of possession of the property, as to which further provision is made in sections 62 and 63. And, *thirdly*, he may require the mortgagee to execute a document, either by way of re-conveyance of the property or by way of acknowledgment that his claim is extinguished. A re-conveyance is necessary only when the mortgage is in the English form.² It may, and indeed should, be effected by endorsement on the mortgage-instrument, and if that instrument was registered, it also must be registered. At any rate, registration is necessary if the interest affected is not less than Rs. 100. The acknowledgment may be made in a similar way and similarly requires registration if the mortgage-instrument was registered. And so where a paper acknowledging the receipt of money, not being used as mere evidence of payment or to show the state of the accounts between the parties is tendered to prove the release or extinguishment of any right over immoveable property, it may be inadmissible in evidence unless registered.³ According to section 17 (n) of the Registration Act "any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage" are excluded from the classes of instruments denoted by sub-sections (b) and (c) of the same section, and therefore such endorsement or receipt does not require registration. Before the sub-section (n) was introduced by the amending Act of 1886, the law

1 Evidence Act, section 130; *Beattie v. Jetha Dungsars*, 5 Bom. H. C., (O. O.), 152; *Fisher on Mortgages*, 4th ed., p. 300; see section 92, note 2.

2 The decree given in section 92 provides only for a re-transfer to the person obtaining a redemption-deed and not for an acknowledgment.

3 *Mahadaji v. Vyankaji*, I. L. R., 1 Bom., 197; *Basawa v. Kalkapa*, I. L. R., 2 Bom., 489; *Ramapa v. Umanna*, I. L. R., 7 Bom., 123, see also *Venkayyar v. Venkatasubbayyar*, I. L. R., 3 Mad., p. 56, *per* Muttusami Ayyar, J., and *Krishna Panda v. Balaram*, I. L. R., 19 Mad., 290.

was declared in much the same terms by the High Courts of Madras, Bombay and Allahabad.¹

Note 2. Extinguishment of the right of redemption by act of the parties must be effected by release, surrender, or some similar transaction, and if otherwise effectual will, in the absence of fraud, be valid, notwithstanding that it is made under misconception of the mortgagor's rights.* Apart from special circumstances the release by a mortgagor of his equity of redemption, in consideration of the amount of the debt, is valid. The parties stand on the footing of vendor and purchaser, and the burden of proof lies on the mortgagor who impeaches his own deed.* There is obviously no extinguishment by act of parties, when in consequence of failure to pay at the stipulated time the interest of the mortgage becomes by the terms of the instrument absolute.⁴

After decree for foreclosure or sale there can of course be no suit for redemption, the right having already become *res judicata*. In the case of a decree containing no order for sale or foreclosure, it is competent to the mortgagor to execute the decree by paying the mortgage-money at any time, subject only to the rules of limitation relating to the execution of decrees;⁵ on the other hand, it is not competent to the mortgagee to bring another suit for sale, for he might have obtained an order for sale in the redemption suit.* A defendant was in possession under a mortgage-decree obtained by him against the mortgagor, in which he was directed to take possession and hold it until the sum due was paid. The plaintiff then sued for redemption, alleging that the defendant's claim was fully satisfied out of the surplus profits. It was held that the plaintiff was entitled to recover the land only on the condition named in the former decree and was not entitled to have an account taken.⁷ The fact that the land is sold under the Revenue Recovery Act, Madras, (Act II of 1864) and bought by the mortgagee, does not itself deprive the mortgagor of his right to redeem.* Where, however, a decree in a mortgage

1 Venkatarama v. Chinnalhambn, 7 Mad. H. O., p. 4; Shidlingapa v. Chenbasapa, I. L. R., 4 Bom., 235; Annapa v. Ganpati, I. L. R., 5 Bom., 18; Venkayyar v. Venkatasubbayyar, I. L. R., 3 Mad., 53; Jiwan Ali v. Basa Mal, I. L. R., 9 All., 108.

2 Vishnu Sakharan v. Kashinath, I. L. R., 11 Bom., 174.

3 Melbourne Banking Corporation v. Brougham, 7 App. Cas., 307.

4 Perayya v. Venkata, I. L. R., 11 Mad., 403.

5 Narayan v. Anandram, I. L. R., 16 Bom., 480, where no time for payment was fixed in the decree; Bandhu v. Shah Muhammad, I. L. R., 14 All., 350.

6 Maltji v. Sagaji, I. L. R., 13 Bom., 567.

7 Navlu v. Raghu, I. L. R., 8 Bom., 303; Dasharatha v. Navalchand, I. L. R., 16 Bom., 134; Rambhat v. Ragho, ib., 556.

8 Lakshmaya v. Yerubandi, I. L. R., 7 Mad., 111.

suit does not contain an order for foreclosure or for sale, the question may still arise whether the mortgagor, having made default in payment of the amount found due, may within the time allowed by limitation subsequently bring a second suit for redemption. This question can only arise when the decree in the first suit has been irregularly drawn up and does not conform to the provisions of sections 86 and 92. In

Madras it has been answered in the affirmative.¹

Second suit for redemption.

In the view taken by the Madras Court the relation of mortgagor and mortgagee is not put an end to by the mere decree for redemption. The right to redeem still subsists, in the same way as the right of partition subsists, notwithstanding an unexecuted decree for partition. This view has been re-asserted in a recent case with reference to a *kanam*, a transaction in which the elements of a simple and a usufructuary mortgage may be combined. With such a mortgage the decree cannot direct foreclosure, and though there might be an order for sale, it was, in the opinion of Muttusami Ayyar, J., not on the mere passing of such order, but on the sale itself, that the ownership would pass, and the right of redemption would be lost to the mortgagor.² In Bombay it has been consistently held that the principle of *res judicata* applies and that a second suit for redemption will not lie.³ And the view has recently been followed in Allahabad.⁴ Where, instead of a decree in a mortgagor's suit for redemption, there was obtained by the mortgagee a decree ordering the payment of a certain sum by the mortgagor, and until payment leaving the mortgagee in possession, it was ruled by the Judicial Committee that the only remedy open to the mortgagor in respect of the decree was by execution, and that he could not in a second suit in which the decree was treated as a fresh mortgage, seek to redeem. It seems to have been conceded that in a suit properly framed the mortgagor might have sued for redemption on the footing of the original mortgage.⁵ In a somewhat

¹ Sami Achari v. Somasundram, 1. L. R., 6 Mad., 119; Perandi v. Angappa, 1. L. R., 7 Mad., 423; Karuthasami v. Jagannatha, 1. L. R., 8 Mad., 478, dissenting from Gan Savant v. Narayan, 1. L. R., 7 Bom., 467; Nainappa v. Chidambaram, 1. L. R., 21 Mad., 18. In Ramasami v. Sami, 1. L. R., 17 Mad., 96, there was an order debaring the plaintiff from redemption thereafter, and the only point taken was that no further order had been passed under section 93. See note 2 to section 87 as to question when right of redemption under decree is lost.

² Ramunni v. Brahma, 1. L. R., 15 Mad., 366; Vallabha v. Vudaparatti, 1. L. R., 19 Mad., 40.

³ Gan Savant v. Narayan, 1. L. R., 7 Bom., 467; Maloji v. Sagaji, 1. L. R., 13 Bom., 567.

⁴ Hay v. Raz-ud-din, 1. L. R., 19 All., 203; as to the English practice see Marshall v. Shrewsbury, L. R., 10 Ch., 253.

⁵ Hari Ravji v. Shapurji, 1. L. R., 10 Bom., 461; s.c., L. R., 13 I. A., 66.

similar case which came before the Judicial Committee an irregular decree had first been obtained by the mortgagees, allowing the defendants three months to pay the sum mentioned and in default giving possession to the plaintiffs. The mortgagees subsequently took possession and eleven years afterwards the mortgagors brought a suit for redemption. As the decree did not amount to a foreclosure it was held that the mortgagees must submit to be redeemed.¹ It is clear that, when the mortgagee obtains a mere decree for possession of the mortgaged property and is put into possession accordingly, it is not competent to the mortgagor to apply under that decree for redemption. His remedy is by a separate suit.²

Note 3. The Act does not require that the mortgagor after making default in payment at the stipulated time shall give notice to the mortgagee of his intention to pay off the debt. It is only reasonable that he should give such notice in order that the mortgagee may have an opportunity to find a new investment for his money, and a prudent mortgagee would stipulate for it. In England it has become a settled rule that a mortgagor must after default give six months' notice of his intention to pay the debt or pay six months' interest, unless the mortgagee has demanded payment or taken steps to compel it in which case notice is unnecessary.³ But this rule is founded on the supposition that a loan on mortgage is intended to be of a permanent character, and therefore does not apply where it appears that the mortgage was intended to be merely temporary, as is usually the case with a mortgage by deposit of title-deeds.⁴ The proviso recognises the validity of a stipulation for notice, as well in the case where a fixed time is given for payment and that time has expired, as in the case where no such time is fixed.

Note 4. A proviso, being in the nature of a caution not to place a certain meaning on the rest of the section, may serve to indicate the recognition on the part of the Legislature of a rule of law but cannot well serve as an adequate expression of it. It would be a mistake therefore to look to the proviso for an exhaustive statement of the rule recognized in it, namely, that a person interested in the right of redemption is not at liberty to redeem his share or part of the mortgaged property on payment of the proportion of the debt chargeable to it. The rule expressed

Mortgage generally indivisible.

1 Sri Raja Papanma Rao v. Pratapa, I. L. R., 19 Mad., 249.

2 Haf Prasad v. Shoo Ram, I. L. R., 20 All., 506; Ravji v. Kaluram, 12 Bom. H. C., 160.

3 Fisher on Mortgages, 4th ed., p. 734; Smith v. Smith, [1891] 3 Ch., 550.

4 Fitzgerald's Trustee v. Mellersh, [1892] 1 Ch., 385.

in this way, or in the form that there can only be one suit for redemption against the same mortgagee, flows from the nature of the contract of mortgage. Ordinarily the property comprised in a mortgage, though it may consist of several parcels, or may be or become vested in several persons, is held in its entirety as security for the entire debt and every part of it. It is open to any one of such persons or the owner of any one parcel to redeem the whole mortgaged property, (see section 95,) but he can only do so on the terms of paying the entire debt. It is the right of the mortgagee to have all the questions arising out of the mortgage-relation adjudicated upon once for all in one suit, just as it is the right of a joint-tenant, when a claim for partition is made against him, to demand that the whole property held in common, and not a part of it only, shall be made the subject of division.

Analogous to this right of the mortgagee against whom redemption is sought is the right of the mortgagor against whom a claim is made for the realization of the security. The mortgagor is generally entitled to demand that the whole claim shall be put in action in one suit, and if therefore one of the mortgagees sues to realize a portion of the security for a proportionate part of the debt the mortgagor has a valid reason to ask that the suit must be dismissed. This right of the mortgagor is recognized in the proviso to section 67.

The reason of the rule as regards the mortgagee's right is thus stated by the Judicial Committee :—

"It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption may come, without bringing the other purchasers into Court, and have an account as between himself and the mortgagee alone, so that the mortgagee may be paid off piecemeal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created."¹

The application of the general rule is not affected by the fact that part of the mortgaged property has been sold for arrears of revenue.² All the persons interested in the equity of redemption should be ascertained and, if not made plaintiffs, should be joined as defendants,³ or

1 Nilakant v. Suresh Chandra, I. L. R., 12 Cal., p. 423; s.c., L. R., 12 I. A., 171.

2 Syud Hashim v. Baboo Anjeet, W. R., 1864, Civ. R., p. 217.

3 Timmappa v. Lakshamma, I. L. R., 5 Mad., 385; Kuppusami v. Papathi, I. L. R., 21 Mad., 369; Balkrishna v. Nagvekar, I. L. R., 6 Bom., 321; Gan Savant v. Narayan, I. L. R., 7 Bom., p. 472; Ragho v. Balkrishna, I. L. R., 9 Bom., p. 128; Norender Narain v. Dwarka Lal, I. L. R., 3 Cal., 307; s.c., L. R., 5 I. A., 27; Fakir Bakhsh v. Sadat Ali, I. L. R., 7 All., 370; Naro v. Vithalbat, I. L. R., 10 Bom., 648.

otherwise the decree should be made subject to their rights.¹ If however a decree is made in a suit for partial redemption, the mortgagor is not in consequence precluded under section 43 of the Civil Procedure Code from instituting another and regular suit for redemption.² While the owner of part only of the equity of redemption is thus compelled in paying the whole debt to pay more than he is bound to pay as between himself and the others interested with him, he acquires a right to hold the whole property when redeemed as security for the extra payment he has made. In other words, he himself assumes the position of a mortgagee and is entitled to contribution.³ He may also recover the money paid by him in excess of his share under section 69 of the Contract Act.⁴ Holding the property in right of his lien, he may be redeemed by his co-sharers on payment of their share of the debt. His possession is not adverse to them, and therefore their suit is not barred because brought more than twelve years after his possession began.⁵ On the other hand it has been held that, when the mortgage debt has been satisfied out of the usufruct, a person entitled to a share of the equity of redemption can claim that share only from the mortgagee, and that if he obtains possession of the other shares he will hold them adversely to the persons interested. In such a case the plaintiff claims in ejectment and does not sue to redeem.⁶

One case only is excepted in the proviso, namely, that in which the share of a mortgagor has passed to the mortgagee. *Case excepted in proviso.* The marginal note is not quite accurate. Presumably the case of several persons interested as sharers in the mortgaged property is intended. The exception does not cover the case where a share in the right of redemption has become vested in one of several mortgagees.⁷ The rule with the exception was stated as follows before the passing of the Act:—

“A mortgagee is entitled to say to each of several persons who may have succeeded to the mortgagor’s interest that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of

1 Hall v. Howard, 32 Ch. D., 430; Konna Panikar v. Karunakara, I. L. R., 16 Mad., 328, and see section 85.

2 Narayan v. Ganpat, I. L. R., 21 Bom., 625.

3 See section 95; and see Asansab v. Vamana, I. L. R., 2 Mad., 223; Vithal v. Vishvasarav, I. L. R., 8 Bom., 497.

4 Mothooranath v. Kristo Kumar, I. L. R., 4 Cal., 369.

5 Brmchandra v. Sadashiv, I. L. R., 11 Bom., 422.

6 Gobardhan v. Sujau, I. L. R., 16 All., 254; Fakir Baksh v. Sadat, I. L. R., 7 All., 376.

7 Mahtab Rai v. Sant Lal, I. L. R., 5 All., 276.

"the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagee, who has acquired by purchase a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the debt on the remaining portion of the equity of redemption in the hands of one who has purchased it in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden and must discharge it."¹

Suppose, for instance, that A and B are mortgagors of a certain property, and C, being the mortgagee, purchases B's share in the property. C cannot be permitted to throw on A's share the whole burden of the debt. A is therefore allowed to redeem that share on paying a proportionate part,² and, cannot claim to redeem the whole.³ In an earlier Madras case a decree for redemption of the whole property obtained against the mortgagee in possession, who had bought the equity of redemption of part of the property was reversed, it being considered that the plaintiff ought first to have sued for partition.⁴ In Bombay, on the other hand, it has been held that the owner of a share in the right of redemption is, as against the mortgagee who has bought another share, entitled to redeem the whole property and to leave the latter to bring his suit for partition afterwards.⁵ Where there had been a decree for partition of the mortgaged property and one of the shares had by inheritance vested in the mortgagee, the same Court held that, as he could not be compelled to surrender that share, the redemption of the remainder should be allowed on payment of a proportionate part of the mortgage money.⁶

There are other cases, not excepted in the proviso, in which an exception from the general rule against partial redemption has been allowed. Instead of buying a share of one of several mortgagors, the mortgagee may buy one out of the several parcels making up the mortgaged property. In such a case a merger of the two rights, that of mortgagor and that of mortgagee, takes place and there is no doubt that the mortgagee must be taken to have split up his security and to have

1 *Mahtab Singh v. Misree Lal*, 2 Agra, 88. The section, it may be noted, does not show that the mortgagee must have acquired part of the mortgagor's interest necessarily by purchase.

2 *Kuray v. Puran*, I. L. R., 2 All., 565; *Nathoo Sahoo v. Lallah Ameer*, 15 Beng. L. R., 303. As to valuation in such a suit see *Bahadur v. Nawab Jas*, I. L. R., 3 All., 822; *Balkrishna v. Nagvekar*, I. L. R., 6 Bom., 324.

3 *Ariyapatri v. Alamelu*, I. L. R., 11 Mad., 304.

4 *Marakar v. Punjapatath*, I. L. R., 6 Mad., 61.

5 *Narayan v. Ganpal*, I. L. R., 21 Bom., 620; *Mora v. Ramchandra*, I. L. R., 15 Bom., 24. There is no reference to the Act in these cases.

6 *Alikhan v. Mahamadkhan*, I. L. R., 10 Bom., 658.

precluded himself from objecting to an apportionment.¹ In *Azinut Alikhan v. Jowahir*² it was held by the Judicial Committee that the plaintiffs who had bought one of several mortgaged villages, sold in execution of decrees against the mortgagors, were entitled to redeem that village only on payment of the proportion of the debt chargeable on it and were not entitled to redeem the other villages against the will of the mortgagee who had bought the larger part of the mortgaged property.

When in the mortgage-transaction the intention is clearly expressed that each of the several mortgagors shall have a separate interest in the mortgage, the general rule becomes inapplicable. Thus where it was provided that, on any of the vendors paying his quota of the sale-consideration, the sale of his share should be invalid, it was held to be no objection to the suit that the plaintiff was asking for a partial redemption.³ In the following case it was held that the mortgagee had by his own conduct destroyed the indivisibility of the contract, and thus precluded himself from insisting that a purchaser of part of the mortgaged property should redeem the whole, paying the whole debt. The facts were that, while the defendant was purchaser of one of two mortgaged parcels of land, the other parcel had been purchased by a third person and from him taken on lease by the mortgagee. Under these circumstances it was said that the mortgagee had himself by abandoning his possession of the second plot of land destroyed the indivisibility of the original contract and entitled the purchaser to redeem on payment of a proportionate part of the mortgage-debt.⁴ This decision was followed in a later case where the plaintiff bought the mortgagor's interest in one of the mortgaged parcels and subsequently the mortgagor executed a second mortgage to the same person of that parcel and the others excepting one which he redeemed for Rs. 20. In a suit to redeem the parcel bought by the plaintiff it was held that a severance of the mortgage contract had been effected by the fact of the mortgagee releasing one parcel and making a further advance.⁵ This decision, which it is not easy to understand, and the earlier case have

¹ *Perjada v. Sha Kalidas*, I. L. R., 21 Bom., 544; *Moro v. Balaji*, I. L. R., 13 Bom., 45.

² 13 Moo. I. A., 404; see as to this case *Hirdy Narain v. Syed Allacollah*, I. L. R., 4 Cal., 72.

³ *Ram Saran v. Amirta*, I. L. R., 3 All., 369; *Ram Kristo v. Mussamut Amecroonissa*, 7 W. R., 314; *Hunooman Persaud v. Kaleepersaud*, W. R., 1864, p. 295; *Indurjeet v. Brij Pilas*, 3 W. R., 130.

⁴ *Marana v. Pendyala*, I. L. R., 3 Mad., 230; *Subramanyan v. Mandayan*, I. L. R., 9 Mad., 453.

⁵ *Subramanya v. Mandayan*, I. L. R., 9 Mad., 458.

been disapproved in an Allahabad case.¹ The facts are not clearly stated. The plaintiffs holding a third mortgage of one parcel sought to redeem two prior mortgages of that and other parcels. On the first mortgage payment had been made to the extent of half the mortgage-money and redemption of half the mortgaged property had followed. Under these circumstances the plaintiffs sought to redeem on the terms of paying a proportionate part of the balance remaining due on the first mortgage, but it was held that redemption could be allowed only on the terms of the full amount due being paid. Cases of this sort have to be distinguished from those in which the owners of the equity of redemption are tenants-in-common. The general rule that one of several tenants-in-common may redeem the whole estate cannot apply to cases in which the plaintiff is interested in a distinct part of the mortgaged property.²

61. A mortgagor seeking to redeem any one mortgage, shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Right to redeem one of two properties separately mortgaged.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Commentary.

Under this section taken from the Conveyancing and Law of Property Act, 1881,³ the doctrine of consolidation which before the Act was passed was recognized by the Courts in India,⁴ cannot be applied except in cases in which special provision for it is made by contract.⁵

It has been held that it is competent to one who has taken two independent mortgages of the same property to bring separate suits for

¹ Lachmi v. Mahammad, I. L. R., 17 All., 63.

² Naro Hari v. Vithalbhat, I. L. R., 10 Bom., 648, 653.

³ 44 & 45 Vic., c. 41, section 17; Griffith v. Pund, 45 Ch. D., 553.

⁴ Vithal v. Daud Muhammad, 6 Bom. H. C., (A. C.), 90.

⁵ Tajjo Bibi v. Bhagavan, I. L. R., 16 All., 237; see Chhotatal v. Mathur Kevalram, I. L. R., 18 Bom., 591; Sundar Malhav v. Bapuji, ib., 755, cases in which a special contract was set up.

sale, though it is not clear what use he could make of the two decrees as the same property could not be sold twice.¹ The doctrine of consolidation is stated in the following terms by Fisher²:—

“If the owner of different estates mortgage them to one person separately for distinct debts, or successively to secure the same debt, or the same debt with further advances, the mortgagee, so long as both securities exist, may insist that one security shall not be redeemed alone; upon the principle that redemption being an equitable right the person who redeems must on his part do equity towards the mortgagee and redeem him entirely, not taking one of his securities and leaving him exposed to the risk of deficiency as to the other.”

The original and simple case was that in which one person, owning several properties, conveyed them by separate instruments of mortgage to one and the same creditor; but the doctrine has been extended to cases in which the rights of redemption have been separated and thus come into the hands of different persons, and again to cases in which the mortgages, being at first held by several persons, have subsequently come into the hands of one person. Necessarily, when consolidation is claimed, there must be one person in whose hands the mortgages are united. His claim is to have the consolidated mortgages made practically one and thus to have a lien on the whole property for the whole debt. His claim is not defeated by the circumstance that the right of redemption in respect of one mortgage has been transferred to a third person by the owner of the several properties mortgaged, for the purchaser of any mortgaged property takes it subject to all rights and equities with which it was affected in the hands of his vendor. It follows that such purchaser cannot be prejudiced by a mortgage of other property of his mortgagor executed after the date of his purchase. He cannot be prevented from redeeming his property by itself.³ Nor again can consolidation be claimed against the purchaser of one of several mortgaged properties, when the mortgages, being originally taken by several persons, only came to be united in one person after the date of the purchase.⁴

62. In the case of a usufructuary mortgage the mortgagor has a right to recover possession of the property—

Right of usufructuary mortgagor to recover possession.

- [1] (a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,—when such money as paid;

¹ *Sundar Singh v. Bholu*, I. L. R., 20 All., 322.

² *Fisher on Mortgages*, 4th ed., p. 597; see *Harter v. Coleman*, 19 Ch. D., 630.

³ *Jennings v. Jordan*, 6 App. Cas., 698.

⁴ *Fisher on Mortgages*, 4th ed., p. 600.

(b) where the mortgagee is authorised to pay himself [2] from such rents and profits the interest of the principal money,—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

Commentary.

This section, dealing with usufructuary mortgages in particular, would seem to be supplemental to the general provisions contained in section 60. Although recovery of possession of the property only is provided for, it is presumed that the mortgagor who is in a position to recover either under clause (a) or clause (b), is also entitled to have the mortgage-deed delivered up and to call upon the mortgagee to execute in his favour the acknowledgment mentioned in section 60.

Note 1. (a) The case where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property comes under the second of the three classes of usufructuary mortgages described in section 58 (d). The right to recover the property arises when, on the accounts being taken as provided in section 76, it appears that the principal and interest secured by the mortgage have been liquidated out of the monies received by the mortgagee.¹ Although it is the duty of the mortgagee in possession, when called upon, to render accounts under section 76 (g), the mortgagor cannot bring a suit for an account without adding a prayer for redemption. If, therefore, before instituting the suit under this section, he has not ascertained that the mortgage-debt is satisfied, he should frame his suit accordingly, asking that an account may be taken and offering to pay whatever may be found due. It is, however, competent to the Court to give to a plaintiff, who erroneously alleges that the debt is satisfied, a decree conditional on his paying the amount found due within a fixed time,² and in Bengal it seems to have been held that this practice is the proper one.³ A similar decree was made by the High Court at Allahabad in a case where the mortgagees had never rendered accounts and had denied that they held as mortgagees, and where the plaintiff, on the other hand, had had

1 Reference under Stamp Act, section 46, I. L. R., 7 Mad., p. 206.

2 Baboo Kalyan v. Baboo Sheo Nandan, 18 W. R., 65; see Mokund Lall v. Goluck Chunder, 9 W. R., 572, and section 60, note 1.

3 Shah Lutafut v. Chowdhry, 22 W. R., 269; Boistub v. Huzo, 17 W. R., 408; see Fisher on Mortgages, 4th ed., p. 675.

no means of ascertaining what was due.¹ In the converse case where the defendant is the party having the right to redeem and the suit is notwithstanding framed as a suit for mere possession, it may not be improper to make a decree for redemption instead of dismissing the suit.² In a case decided with reference to the Regulation XV of 1793, where the mortgagors took advantage of its provisions to call for accounts and redeem before the expiration of the term, it was held that "it lay on the plaintiffs to show that the mortgagees were paid in full out of their receipts. It was not a suit to make them chargeable for non-receipt or profits which they might have received with common care and attention." The judgment goes on to remark that the receipts must not be estimated on the basis of those actually enjoyed by the mortgagors, for the change of management might cause a falling-off and the mortgagee is not an assurer of the continuance of the same rate of profits which his mortgagor was able to raise.³

This right to recover possession must also arise in the case of the usufructuary mortgage of the third class described in section 58 (d), where the duration of the possession has been such that interest and principal have, under the arrangement between the parties, been paid off. In such cases where the receipts are taken as the equivalent for interest and defined portions of the principal, no question of accounts arises; the mortgagor's right to recover possession accrues immediately on the expiration of the fixed period of time.⁴

Note 2. (b) The case mentioned in this clause is not identical with any of the three mentioned in section 58 (d), for liberty to pay oneself interest out of rents and profits is a different thing from a power to appropriate such rents in lieu of interest. In the former case there may be a balance one way or the other after the receipt of the rents. However, the clause is evidently intended to refer to the latter case, because the right to recover the property is made dependent on payment of the principal only, and it is assumed that no interest can be due.⁵ Where by the terms of the mortgage the profits were estimated to be Rs. 65-10-6, out of which the mortgagee was to pay Rs. 23-3-0 for Government revenue and to appropriate the rest as interest on the loan,

1 *Sahib Zadah v. Parmeshar*, I. L. R., 1 All., 524; *Baradakant Rai v. Bhagwan Das*, *ib.*, 344.

2 *Kasimunnissa v. Nilratna*, I. L. R., 8 Cal., p. 87; *Narayan Venkoba v. Pandurang*, I. L. R., 7 Bom., 526.

3 *Shah Mukhun Lall v. Baboo Kishen Singh*, 12 Moo. I. A., p. 192. See further, as to accounts against mortgagee in possession, notes to sections 76 and 86.

4 *Sethuracherla v. Vairicherla*, I. L. R., 2 Mad., 314; see p. 210 and section 77.

5 *Venkatachellam v. Tirumala*, 2 Mad. H. C., 289.

and it appeared that the mortgagor had paid the revenue on the mortgagee's failing to do so; it was held that the former in suing to redeem was entitled to take credit for these payments and to avail himself of annual rests in making up the account.¹ It is not unusual for the holder of a usufructuary mortgage to give a lease of the property to the mortgagor and allow him to remain in possession paying by way of rent a sum equivalent to the interest on the mortgage-money. When such a lease is given, arrears of rent are in effect arrears of interest and the mortgagor cannot redeem without paying them.²

63. Where mortgaged property in possession of the [1]
mortgagee has, during the continuance of
the mortgage, received any accession, the
mortgagor, upon redemption, shall, in the
absence of a contract to the contrary, be entitled as against
the mortgagee to such accession.

Where such accession has been acquired at the expense [2]
of the mortgagee, and is capable of separate
possession or enjoyment without detriment
to the principal property, the mortgagor
desiring to take the accession must pay to the mortgagee
the expense of acquiring it. If such separate possession or
enjoyment is not possible, the accession must be delivered
with the property, the mortgagor being liable, in the case
of an acquisition necessary to preserve the property from
destruction, forfeiture or sale, or made with his assent, to
pay the proper cost thereof, as an addition to the principal
money, at the same rate of interest.

In the case last mentioned the profits, if any, arising [3]
from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession [4]
has been acquired at the expense of the mortgagee, the
profits, if any, arising from the accession shall, in the
absence of a contract to the contrary, be set-off against
interest, if any, payable on the money so expended.

1 *Jaijit v. Gobind*, I. L. R., 6 All., 308. see section 76 (h).

2 *Imdad Hasan Khan v. Badri Prasad*, I. L. R., 20 All., 401.

Commentary.

Note 1. As a general rule, accessions to the mortgaged property enure to the benefit of the mortgagee and his security, and, on the other hand, are subject to redemption.¹ The first paragraph apparently deals with natural accessions and accessions other than those acquired at the mortgagee's cost. Where a village was mortgaged as a whole, no boundaries being specified, and after the mortgage was made, an area larger than was supposed to belong to the village was demarcated, it was held that the area thus enlarged was redeemable.²

Note 2. In the second paragraph provision is made, *firstly*, for those accessions which, being made at the mortgagee's expense, may be enjoyed or possessed separately from the original mortgaged property. The mortgagor must, if he desires to take over such an accession, pay the cost of its acquisition. He is not bound to take it, and apparently cannot claim it as a matter of right. This provision however must be read with that contained in section 90 of the Indian Trusts Act,³ for if the mortgagee, by availing himself of his position as such, gains an advantage in derogation of the rights of the mortgagor, he must hold for the benefit of the mortgagor the advantage so gained, subject to repayment by him of expenses properly incurred. On this principle, where the mortgagee of a field being in possession bought from Government some trees standing on the field, it was held that the mortgagor was entitled to recover them together with the field, on payment of the mortgage-money and of the money expended in purchasing them.⁴ *Secondly*, the paragraph provides for the case where the accession is inseparable from the principal. Where the acquisition has been made to preserve the property from destruction, forfeiture, or sale, the cost of it must, as is also declared in section 72, be added to the mortgage-money, and the result is the same if the acquisition was made with the mortgagor's assent.⁵ Otherwise the mortgagee is not at liberty to charge the mortgagor with the cost of improvements or with interest on capital expended thereon.⁶

Note 3. The profits arising from the improvements made by a mortgagee during his possession accrue to the mortgagor or to the

1 Kishendatt v. Rajah Mumtaz, I. L. R., 5 Cal., p. 210; see section 70, and compare Contract Act, section 65.

2 Sadashiv v. Vithal, 11 Bom. H. C., 32.

3 Act II of 1882, section 90, quoted in note to section 64.

4 Bakshiram v. Darku, 10 Bom. H. C., 369.

5 See Durga Singh v. Naurang, I. L. R., 17 All., 282.

6 Prabhakar v. Pandurang, 12 Bom. H. C., 88; see further as to mortgagee's improvements, note 2 to section 72.

mortgagee according as the latter can or cannot charge the mortgagor with the cost of making them.

Note 4. It having been provided that the mortgagee may charge interest on moneys expended by him either for the preservation of the property or for the improvement of it with the mortgagor's assent, this paragraph enacts that any profits resulting to him from such expenditure shall be applied in satisfaction of his claim for interest as far as they will go. It is to be noted that this paragraph refers particularly to usufructuary mortgages, whereas the rest of the section treats of the mortgagee in possession generally.

64. Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

Renewal of mortgaged lease.

Commentary.

As sections 63 and 70 deal with accessions generally, providing that except in the specified cases, the benefit of the accession shall be added to the security and be, on the other hand, subject to redemption; so in this section and section 71 similar provision is made for the particular case of the renewal of a lease obtained by the mortgagee. The renewed lease is, like the originally mortgaged property, subject to redemption; but, as the mortgagee is not bound to renew, he is entitled to add the cost of effecting the renewal to the principal mortgage-money and charge interest upon it. A similar provision is made in section 90 of the Indian Trusts Act:—

“Where a tenant-for-life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.”

It will be observed, however, that that section contains qualifications, which do not appear in the present section, and it may be doubted whether the rule in favour of the mortgagor is intended to prevail in all cases, as where the renewal has not been obtained behind the back of the mortgagor, or by the mortgagee taking advantage of his position. In a case where the mortgagee from an Oudh talukdar redeemed certain

birt tenures to which the mortgaged villages were subject, the Privy Council declared itself not prepared to affirm "the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms." The judgment proceeded to say:—

"It may well be, that when the estate mortgaged is a zemindari in Lower Bengal, out of which a patni-tenure has been granted, or one within the ambit of which there is an ancient mokurari istimrari tenure, a mortgagee of the zemindari though in possession might purchase with his own funds or keep alive for his own benefit that patni or mokurari. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger; and may therefore be held entitled, equally with a stranger, to make it for his own benefit."

In the peculiar circumstances of the case, one of which was that the mortgagee had allowed the sub-tenures which he had bought in to become merged in the taluk and had taken no steps to keep them alive, it was held that the mortgagor was, on payment of the mortgage-money and on reimbursing the defendant the amount expended by him in purchasing the tenures, entitled to the benefit of the purchase.¹

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,

Implied contracts
by mortgagor.

- [1] (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;
- [2] (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;
- [3] (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;
- [4] (d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on

¹ *Rajah Kishendatt v. Rajah Mumtaz*, 1. L. R., 5 Cal., 198; s.c., 1. L. R., 6 I. A., 145; and see *Doorga Singh v. Sheo Pershad*, 1. L. R., 16 Cal., 164; *Fisher on Mortgages*, 4th ed., p. 690.

the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(e) and, where the mortgage is a second or subsequent [5] incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior incumbrance.

Nothing in clause (c), or in clause (d), so far as it [6] relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section [7] shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Commentary.

Note 1. (a) A similar covenant is implied in favour of a purchaser of land as against the beneficial owner on the sale or exchange of land.¹ In England it is now provided by the Conveyancing Act, 1881,² that in a conveyance by way of mortgage there is implied the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):—

"That the person who so conveys has, with the concurrence of every other person (if any) conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him subject as if so expressed, and in the manner in which it is expressed to be conveyed."

¹ See section 55 (2) and note 8 thereto.

² 44 & 45 Vic., c. 1, section 47 (c).

As to the consequences of a breach of the covenant for title see note 2 to section 68.

Note 2. (b) The section of the statute, from which the above passage is cited, goes on to set out the ordinary covenants for quiet enjoyment and for further assurance. Instead of a clause embodying a similar covenant, such as is also found in section 108 (c),¹ the obligation here imposed is, in the case of the mortgagor in possession, to defend the mortgaged property, and in the case of the mortgagee being in possession, to supply him with the means of making such a defence, that is, presumably to supply him with information or with evidence of title. Apart from the Act the obligation on the mortgagor's part, as long as the right of redemption remains with him, to indemnify the mortgagee against expenses incurred in protecting the title is one implied by law, and does not need an express contract to bring it into existence.² The protection to the mortgagee which in England is given by a covenant for quiet enjoyment is under the Act given by section 68, clauses (b) and (c), according to which he is entitled to recover the mortgage-money, when he is deprived of his security by or in consequence of the wrongful act or default of the mortgagor, *e.g.*, a breach of the obligation imposed by clause (b) of the present section, or where the mortgagor fails to secure to the mortgagee possession without disturbance by the mortgagor or any other person.

Note 3. (c) The duty of paying Government revenue falls on the mortgagor or the mortgagee, according as the former or the latter is in possession. A breach of this duty by the mortgagor entitles the mortgagee to take advantage of the provision made in section 68, and to sue for the mortgage-money. Further, if in consequence of such breach the property is sold, "any proceeds which may arise from the sale in excess of the arrears, belong to the mortgagee and he has a right of action for their recovery."³ This clause is worded so as to apply only to charges accruing due after the mortgage, but it is equally important to the mortgagee that charges accruing due before that date should be paid. While the mortgagee is at liberty to add to his charge moneys spent on account of revenue or otherwise in the preservation of the property,⁴ no such right belongs to the mortgagor.

"In my opinion," says Cotton, L.J., "it would be utterly wrong to say that a mortgagor, the owner of the equity of redemption, can under those circumstances,

1 *Damodar v. Vamanrav*, I. L. R., 9 Bom., 435; and compare section 72, note 2.

2 *Heera Lall v. Janokeenath*, 16 W. R., 222; *Kristodass v. Ramkant*, I. L. R., 6 Cal., 142; and see section 73.

3 See section 72 (b).

"defeat the incumbrancers on the estate. Suppose the mortgaged property is a mine "and the owner of the equity of redemption were to spend large sums of money in "order to prevent the mine being flooded or otherwise destroyed, could he have in "respect of that expenditure a lien on the estate as against the persons having "charges and mortgages on that estate? In my opinion, no."¹

On the same principle a claim on the part of the mortgagor to be paid out of the mortgaged property the cost of taking out letters of administration, which were necessary to complete his title, were disallowed.²

Note 4, (d) With regard to the state of things antecedent to the mortgage, the mortgagor covenants that he has paid the rent and performed and observed the covenants contained in the lease. For the future he likewise covenants that, as long as the mortgagee is not in possession, he will pay the rent and observe the covenants, and further indemnify the mortgagee against claims arising by reason of default on his part. A similar covenant is implied in mortgages of leasehold property in England by force of the Conveyancing Act, 1881.³ Mortgages of leaseholds may be effected either by assignment or by underlease of the term. If the mortgage is by assignment of the term, the mortgagee becomes, as from the date of the mortgage, liable himself to the lessor in respect of the covenants contained in the lease.⁴

Note 5, (e) The second or subsequent mortgagee of course takes subject to prior incumbrances, and if the mortgagor fails to discharge them, it is open to such subsequent mortgagee to redeem them.⁵ Or he may sue for the breach of the contract implied by virtue of this clause and recover the mortgage-money, although there is no personal covenant to pay it.⁶

Note 6. The proviso seems to be superfluous and not very accurately worded. Clause (c) says nothing of rent, and clause (d), so far as rent accruing due after the mortgage is concerned, does not apply where the mortgagee is in possession.

Note 7. This last clause is taken from the Conveyancing Act, 1881.⁷ A similar provision is made with regard to certain covenants made by the vendor⁸ and lessor.⁹

1 *Falcke v. Scottish Imperial Insurance Company*, 34 Ch. D., p. 243.

2 *Saunders v. Dunman*, 7 Ch. D., 825.

3 44 & 45 Vic., c. 41, section 7 (D).

4 *Fisher on Mortgages*, 4th ed., p. 16; and see section 108; for rent due before the assignment he is not liable, *Macnaghten v. Lalla Mewa*, 3 Cal. L. R., 285.

5 See section 91 (a).

6 *Singjei v. Tiruvengadam*, I. L. R., 13 Mad., 192.

7 44 & 45 Vic., c. 41, section, 7 (F) (6).

8 Section 55 (2).

9 Section 108 (c)

66. A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Commentary.

The English rule is similar to that here laid down. As long as the mortgagor is allowed to remain in possession, his position according to English law is similar to that of a tenant-at-sufferance. He is at liberty to exercise the ordinary rights of property and to receive the rents and profits without accounting for them.¹ Even if a receiver is appointed in a foreclosure suit, it is only from the date when the receiver makes demand for possession that the mortgagor is liable to pay an occupation rent.² He is not responsible for permissive waste and will not be restrained from doing acts which lessen the value of the property unless it is shown that the security is insufficient.³

The interests of the mortgagee require that the mortgagor should not be allowed to diminish the value of the property and so impair the security. The mortgagor in possession has accordingly been restrained from removing valuable fixtures and cutting down timber.⁴ Similarly under the Easements Act, section 10, he is not at liberty to impose on the mortgaged property any easement that renders the security insufficient. The general words here used to denote acts of waste are also used in section 108 (c) in reference to lessees. The explanation settling the proportion which the mortgaged property shall bear to the amount due in order to be deemed a sufficient security is taken from the law of trusts. The same proportion is fixed in the Trusts Act, section 6 of which prescribes the classes of securities in which trustees may invest.⁵

¹ See below 'accounts against mortgagor,' note to section 86.

² Yorkshire Banking Co. v. Mullan, 35 Ch. D., 125.

³ Fisher on Mortgages, 4th ed., pp. 293, 406.

⁴ *Ib.*, p. 293.

⁵ Act 11 of 1882; and see Fisher on Mortgages, 4th ed., p. 280.

Rights and Liabilities of Mortgagee.

67. In the absence of a contract to the contrary, the mortgagee has, at any time after the ^{Right to fore-}closure or sale. mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property, is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorize a simple mortgagee as such to institute [1] a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mort- [2] gagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal or [3] other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the [4] mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Commentary.

The initial words of this section show that the remedies of a mortgagee may be modified by contract. The question when the mortgage-money has become payable is the same as that which arises under section 60; for,

Remedies of mortgagees.

as a general rule, the right to redeem and the right to foreclosure are co-extensive.¹ Payment of the mortgage-money or deposit of it in Court under section 83 or, as Mr. Stokes suggests, tender, affords an answer to the mortgagee's suit. Only if deposit is pleaded, it must be proved that the mortgagee had notice of it before he filed his suit.² According to the construction of this section to which the High Court of Bengal inclines, it must refer only to the form of suit which can be brought on an English mortgage, that is, a suit in which the mortgagee claims relief in the alternative, foreclosure or sale.³ This construction cannot be accepted without hesitation. The section, in giving the conditions under which a mortgagee may enforce his rights, is perfectly general in its terms and the language used with reference to the remedies available certainly does not exclude the idea that the mortgagee may under the section ask for and obtain one order or the other according as he may from the nature of his mortgage be entitled to one or the other. Moreover, if this section is not to be taken as referring to simple mortgages, in respect of which sale only can be asked for, or to conditional sales in respect of which foreclosure is the only remedy, there is no similar section dealing with those mortgages. It is hardly reasonable to suppose that the Legislature, while prescribing the conditions under which an English mortgage might be enforced, would fail to prescribe such conditions with respect to mortgages of a kind more generally known in this country.⁴ The provisions of this section can only apply to mortgages executed after the 1st July 1882 and have no reference to the usufructuary mortgagee who as such works out his claim by actual enjoyment of the property.⁵ It is to be observed that the provisions, contained in Regulation XV of 1806, prescribing conditions in the way of demand and the like, precedent to the right of the mortgagee to enforce forfeiture of the mortgagor's estate, are not reproduced in this Act. A strict compliance with those provisions was required by the Courts.⁶

1 See section 60, *ante* pp. 205, 208.

2 Sitaramayya v. Venkataramanna, I. L. R., 11 Mad., 371.

3 Girwar Singh v. Thakur Narain, I. L. R., 14 Cal., pp. 733, 737; see Venkata-suni v. Subramanya, I. L. R., 11 Mad., 88.

4 Motiram v. Vitai, I. L. R., 18 Bom., 90.

5 Sitla Bakhsh v. Lalta Prasad, I. L. R., 8 All., 388; see *ante* p. 7.

6 Norender Narain v. Dwarka Lal, I. L. R., 3 Cal., 397; s.c., I. R., 5 I. A., 18; Madhopessad v. Gajudhar, I. L. R., 11 Cal., 111; s.c., I. R., 11 I. A., 186; Doma Sahu v. Nathai Khan, I. L. R., 13 Cal., 50; Kishori Mohun v. Ganga Babu, I. L. R., 23 Cal., 228; Basdeo Singh v. Mata, I. L. R., 4 All., 276; Sitla Bakhsh v. Lalta Prasad, I. L. R., 8 All., 388; Ajaib Nath v. Mathura, I. L. R., 11 All., 164.

Note 1. (a) Neither the simple mortgage nor the usufructuary mortgagee has the property in the land transfer. *Simple and usufructuary mortgages.* red to him. Neither of them, therefore, can sue for foreclosure; since foreclosure implies that the property is vested in the mortgagee subject to a condition and that an equity only remains to the mortgagor.¹ The simple mortgagee can only sue to obtain a decree for sale of the mortgaged property. The right and remedy are similar to those enjoyed by the holder of a bottomry-bond, the effect of which is to hypothecate the ship and give a maritime lien capable of being enforced judicially in a Court of Admiralty. For the usufructuary mortgagee neither sale nor foreclosure is necessary. He realises his right by possession and enjoyment of profits. Nevertheless it was held in Madras that a decree for sale may be obtained on a usufructuary mortgage. The terms of the instrument are not set out in the report of the case in which this decision was passed nor in the printed record of the appeal giving rise to the decision, in which, however, it is called an hypothecation. The Court construed clause (a), as it has been construed in Calcutta, as only precluding the usufructuary mortgagee from suing for foreclosure or sale in the alternative; and then it is observed "that this is the true construction is clear from sections 86-89, the language of which and in particular the words in section 86 'shall transfer the property to the defendant, and shall, if necessary, put the defendant into possession of the property,' include usufructuary mortgages among transactions upon which the mortgagee may institute a suit for foreclosure or a suit for sale."² Reasons have already been given for doubting whether in clause (a) reference is made to the suit in the alternative;³ and section 86 which relates to the suit for foreclosure can be explained without inferring from the language used in the second paragraph that it was intended to refer to persons holding under mere usufructuary mortgages; for under an English mortgage it is always competent to the mortgagee to take possession, and liberty to do so is a frequent incident of mortgages by conditional sale. The Court did not refer to section 92, from the last paragraph of which an argument in favour of the view that an usufructuary mortgagee may sue for sale might have been drawn. From the language of that paragraph it may be inferred that, on the usufructuary mortgagor obtaining a decree for redemption and then failing to make payment on the due date, the decree may order that the property be sold. But the same paragraph provides that in

1 Compare section 93 and see *Muhammad v. Mannu*, I. L. R., 11 All., 386.

2 *Venkatasami v. Subramanya*, I. L. R., 11 Mad., 88.

3 See *ante* note to section 67, first paragraph.

that event there can in the case of an usufructuary mortgage be no decree for foreclosure. It is difficult to reconcile this distinct provision with the doctrine laid down in the Madras case, and Muttusami Ayyar, J., who took part in the decision, has said in a later case that the construction placed upon section 67, clause (a), so far as it relates to an usufructuary mortgage, is not correct. Both he and Kernan, J., having before them a case of a pure usufructuary mortgage containing no covenant to pay the mortgage-debt, held that the mortgagee was not entitled to a decree for sale,¹ and this is the view adopted in Calcutta² and in Bombay.³

Except for the Madras case which now may be considered overruled, there seems to be no authority for the proposition that either a suit for foreclosure or for sale is open to an usufructuary mortgagee. In a case decided in the North-West Provinces where it was agreed that the mortgagee should have possession for five years and a half, taking the profits in lieu of interest, and possession was not given, because the property was in the hands of a lessee, it was held that a suit for sale would not lie, there being no hypothecation of the property.⁴ The question what remedy is available to the mortgagee has no doubt to be answered by reference to the terms of the contract and not merely to the name of the mortgage.⁵ If there is a covenant to pay and no intention to the contrary is indicated by the terms of the instrument, the remedy by suit for sale is open to the mortgagee.⁶ But if the mortgage is usufructuary, pure and simple, as it is described in section 58, it is clear that, except possibly in the event provided for in section 92, neither sale nor foreclosure is open to the holder of such mortgage, nor can he obtain a decree for money⁷ except in the cases provided for in section 68. The mortgagee by conditional sale obviously does not require a suit for sale. All that he can require is to prevent the mortgagor redeeming him, that is, he can obtain a foreclosure-decree, and, if he is not in possession, an order for possession under the second clause of section 87. It is evidently not intended that he should, after decree for foreclosure

1 *Chathu v. Kunjan*, I. L. R., 12 Mad., 109; *Samayya v. Nagalingam*, I. L. R., 15 Mad., 174; see *Shaik Idrus v. Abdul Rahiman*, I. L. R., 16 Bom., 303.

2 *Luchmeswar v. Dookh Mochan*, I. L. R., 24 Cal., 677.

3 *Sadashiv v. Vyankatrao*, I. L. R., 20 Bom., 296.

4 *Dulli v. Bahadur*, 7 N. W. P., (1875), 55; *Kewul Sahoo v. Rash Narain*, 13 W. R., 445; *Tewaree v. Kasseenauth*, W. R., F. B., 79.

5 *Gopal v. Parsotam*, I. L. R., 5 All., p. 126.

6 *Ramayya v. Gurva*, I. L. R., 14 Mad., 232; see *Nanu v. Raman*, I. L. R., 16 Mad., p. 338; *Sivakami v. Gopala*, I. L. R., 17 Mad., 131.

7 *Luchmeswar v. Dookh Mochan*, I. L. R., 24 Cal., 677.

obtained, bring a separate suit for possession. In cases decided with reference to the Regulation XVII of 1806, the mortgagee was not generally entitled to possession until the expiration of the year of grace, and he might then sue for possession as absolute proprietor by reason of foreclosure having taken place. As such, he had a period of twelve years within which to sue.¹ If, however, the instrument of conditional sale gives the mortgagee a right to enter on default being made, and he seeks to take possession accordingly, time runs against him from the date of such default. When his right was thus extinguished by limitation, he could not acquire a fresh right by proceeding under the Regulation.²

Note 2. (b) The mortgagor may become trustee or executor of the mortgagee, or the mortgagee may become trustee or executor of the mortgagor. The clause provides for the former case only and prohibits a suit for foreclosure. The case is one in which, according to the old practice in Chancery, sale was considered the proper remedy.³ In the other case foreclosure is equally prohibited according to English practice on the principle that it is the duty of the trustee to consult the interests of the mortgagor and that it is for the mortgagor's interest that a sale, and not foreclosure, should take place. Therefore, even if the deed expressly gave him power to foreclose, the Courts would not allow him to do so, but would leave him to his remedy by sale.⁴

Note 3. (c) This clause also follows the rule laid down in England. It is founded on a consideration of the inconvenience which would be caused to the public by the sale or foreclosure of a work such as a railway that has been constructed and maintained mainly for the convenience of the public.⁵

Note 4. (d) The proposition in this clause is the converse of that contained in section 60, paragraph 4.⁶ In general a mortgage is one and indivisible. On the one hand, the holder of a partial interest in the equity of

Mortgage generally indivisible.

¹ *Forbes v. Amceeroonissa*, 10 Moo. I. A., 340; *Mansur Ali v. Sarju Pershad*, I. L. R., 9 All., 20; *Brajanath v. Khilat Chandra*, 8 Beng. L. R., 104; s.c., 14 Moo. I. A., 144; *Ali Abbas v. Kalka*, I. L. R., 14 All., 405.

² *Modun Mohun v. Ashad Ally*, I. L. R., 10 Cal., 69; *Girwar Singh v. Thakur Narain*, I. L. R., 14 Cal., p. 736.

³ *Lucas v. Seale*, 2 Atk., 56; *Robbins' Law of Mortgage*, p. 1017.

⁴ *Tennant v. Trenchard*, L. R., 4 Ch., 537; *Karafi v. Ramlochan*, 5 Beng. L. R., 450.

⁵ *Furness v. Caterham Railway Company*, 25 Beav., 614.

⁶ See *ante* pp. 205, 216.

redemption cannot redeem a part of the property on payment of a proportionate part of the debt. On the other hand, one of the mortgagees cannot claim to realise a portion of the security for a proportionate part of the debt. The mortgagors are all entitled to be made parties to one proceeding, and are not to be exposed to a variety of proceedings in respect of the different interests which the mortgagees may possess.¹ The fact that one of the mortgagors has paid part of the debt, does not justify the mortgagee in excluding that mortgagor² and his share of the property from the suit which he institutes against the other mortgagors. But if in some way the debt has been severed, portions of it having, with the mortgagor's consent, been made chargeable on different portions of the property, the general rule would not apply. And where a partition was effected by the mortgagors and in pursuance of it some of them paid their share of the debt, it was held that the mortgagee having recognized the arrangement could recover the remainder from the share of the other mortgagors.³

The exception, being confined to the case of several mortgagees, who have with the mortgagor's consent, severed their interests, does not cover all the cases which should be taken out of the operation of the rule. For instance, it does not cover the following case. A mortgages X and Y to B, then sells X to B and Y to C. It was held in such a case that the mortgage was split up and that it was competent to the mortgagee to sue C., charging the parcel Y bought by him, with a proportionate share of the mortgage-money.⁴ There can be no doubt that in such circumstances C could redeem his parcel on payment of the proportionate amount, see note 4 to section 60.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only :—

- Right to sue for mortgage-money.
- [1] (a) where the mortgagor binds himself to repay the same :
 - [2] (b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor :

¹ Norender Narain v. Dwarka Lal, I. L. R., 3 Cal., p. 408; Nilakant v. Suresh Chandra, I. L. R., 12 Cal., p. 423; Chandika Singh v. Pohkar Singh, I. L. R., 2 All., 906; Bishan Dial v. Manniram, I. L. R., 1 All., 297.

² Mahadaji v. Ganpatshot, I. L. R., 15 Bom., 257.

³ Bisheshar v. Laik, I. L. R., 5 All., p. 257.

(c) where, the mortgagee being entitled to possession [3] of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or [4] default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section sixty-six, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

Commentary.

Note 1. (a) In a simple mortgage and in an English mortgage

Covenant to pay.

there is a personal covenant to pay the mortgage-money. In mortgages of the other two classes, usufructuary mortgages and mortgages by conditional sale, there may also be a covenant to pay; but such covenant is no essential part of the transaction and cannot be implied,¹ as it is in England.² Whether or not there is a covenant to pay and consequently a personal liability under the instrument is a question of construction. The intention may be that the money shall be paid only out of the hypothecated property and not from out of the general estate of the debtor.³ In a recent case the mortgage-deed provided that "if the mortgagors should fail to

Limitation.

against the property and then on it being exhausted, against the debtors personally. As the suit was

1 *Gopalasami v. Arunachella*, I. L. R., 15 Mad., 304; see however *Musaheb v. Inayat-ul-Jah*, I. L. R., 14 All., 513; for cases before the Act *Munoo Lal v. Reet Bhobun*, 6 W. R., 283; *Vencatavarada v. Venkata*, 23 W. R., 91.

2 *Fisher on Mortgages*, 4th ed., pp. 4, 642, 878; *Sutton v. Sutton*, 22 Ch. D. p. 516; 44 & 45 Vict., c. 41, section 26.

3 *Narotam v. Sheo Pargash*, I. L. R., 10 Cal., 740; *Bunseannur v. Sujast*, I. L. R., 16 Cal., 540; *Singjei v. Tiruvengadam*, I. L. R., 13 Mad., 192.

instituted more than six years after the date fixed for payment of the money, it was held to be barred so far as the personal remedy was concerned.¹ It had previously been decided by the Judicial Committee² that Article 132 of the Limitation Act of 1871 applied only to suits to enforce payment of money by means of a sale of immoveable property, and the Court put the same construction on Article 132 of the Act of 1877. This latter decision overrules some decisions to the contrary of the High Court of Bombay.³ Where there is a separate and independent covenant to pay interest, the mortgagee may restrict his claim to interest in the first instance and subsequently sue for the principal.⁴ And ordinarily a suit may be brought for interest as it accrues due against the mortgagor personally. But where the instrument provided, in default of payment of interest at the due date, for payment of enhanced interest and compound interest, it was held that the mortgagee was precluded from suing for the interest before the principal became due.⁵

The mortgagor's personal liability subsists, notwithstanding his assignment of the equity of redemption to a third person, but it is not thereby rendered absolute. It is still conditional on the mortgagee reconveying the property to him, subject to such rights as may be vested in any third person. This condition is of obvious importance when, as often happens, the mortgagor has sold the property subject to the mortgage and taken from the purchaser a covenant to indemnify him in respect of all claims upon it.⁶ The purchaser, on the other hand, by the mere fact of the assignment to him does not become personally liable.⁷

If a money-decree merely is taken for a mortgage-debt, the mortgagee is under the Act precluded from executing it by sale of the mortgaged property.⁸ If there is a distinct covenant to pay interest periodically and the principal becomes due only on the expiration of a term of years, it is clear that an action may be brought for the interest as and when it falls due and that another suit will lie to recover the principal when the term has expired. In the Bombay case already

1 *Miller v. Runga Nath*, 1 L. R., 12 Cal., 389, followed in *Chatrar Mal v. Thakuri*, 1 L. R., 20 All., 512; *Seshayya v. Annamma*, 1 L. R., 10 Mad., 100; *Bulakhi v. Tuka Rambhat*, 1 L. R., 14 Bom., 378.

2 *Ram Din v. Kalka*, 1 L. R., 7 All., 502; s.c., 1 L. R., 12 I. A., 12.

3 *Bulakhi v. Tuka Rambhat*, 1 L. R., 14 Bom., 378, where, as the instrument was registered, six years and not three years only should have been allowed; *Khemji v. Rama*, 1 L. R., 10 Bom., 519; *Lallubhai v. Naran*, 1 L. R., 6 Bom., 719.

4 *Yashvant v. Vithal*, 1 L. R., 21 Bom., 267.

5 *Kannu v. Natesa*, 1 L. R., 14 Mad., 477.

6 *Kinnaird v. Trollope*, 39 Ch. D., 636.

7 *In re Errington*, [1894] 1 Q. B., 11.

8 See section 99.

cited it was held that, although the mortgagee had sued for arrears of interest falling due after the principal had become due, he was not precluded by section 43 of the Civil Procedure Code from bringing another suit for the principal.¹

Note 2. (b) Apart from any covenant to pay, the mortgagor, and presumably any assignee of the equity of redemption, becomes personally liable in the circumstances mentioned in clauses (b) and (c). The section provides for a personal remedy against him and cannot be interpreted as giving the mortgagee a right to sue for sale of the property.² The suit which he may bring must be instituted within six years of the date when the cause of action arose.³ The 'default' might be a breach of the duty imposed by section 65 (a), (b), (c) or (e).⁴ Thus where according to the terms of the mortgage, the mortgagee was to have possession for a certain period on the expiration of which the money was to be paid, it was held that, on proof that the mortgagee was deprived of his security by reason of a prior mortgage of which he had no notice, he might recover the mortgage-money without waiting for the expiration of the period fixed.⁵ In a case where the mortgaged property was sold in execution of a decree against a third person as if it belonged to him and the mortgagor put forward his claim, but on its being overruled, took no further steps to protect his mortgagee, it was held that he ought to have sued to establish his right to the property, and that not having done so, he had rendered himself personally liable for the mortgage-debt.⁶ So if being in possession he allows Government revenue to fall into arrears and the property to be sold in consequence (see sections 72 (b) and 73). In the case of a mortgagee in possession his obligation to pay revenue does not extend beyond the mortgaged property, and if that is sold on account of arrears due in respect of other land of the mortgagor, the mortgagee may recover against him personally, having also under section 73 a lien on the excess proceeds.⁷

¹ *Yashvant v. Vithal*, I. L. R., 21 Bom., 267.

² *Arunachellam v. Ayyavayan*, I. L. R., 21 Mad., 477; but see *Linga Reddi v. Sama Rau*, I. L. R., 17 Mad., 469, 472.

³ *Unichama v. Ahmed*, I. L. R., 21 Mad. 241; *Rau Javan v. Jagannath*, I. L. R., 25 Cal., 450.

⁴ *Singjei v. Tiruvengadam*, I. L. R., 13 Mad., 193.

⁵ *Radhu Churn v. Parbutty*, 25 W. R., 51.

⁶ *Purlhad Chunder v. Chundeechurn*, S. D. A., 1853, p. 575; compare *Gopala sami v. Arunachella*, I. L. R., 15 Mad., 394, cited in note 2.

⁷ *Sawaba v. Abaji*, I. L. R., 11 Bom., 475.

Note 3. (c) This clause makes provision for two cases concerning the mortgagee entitled to possession. Firstly, there may be failure to put the mortgagee in possession. He is then at liberty to sue the mortgagor for possession of the property;¹ or under the clause he may, notwithstanding the absence of a covenant, bring an action for the money advanced with interest thereon.² In a case where, not having been put in possession, the mortgagee sued for the interest only and recovered judgment, it was held that he was precluded by section 43 of the Procedure Code from bringing another suit to recover the principal.³ The second case is that in which the mortgagor fails to secure possession to the mortgagee without disturbance by the mortgagor or any other person. On this failure the mortgage-money may be recovered. In cases where the mortgagee was dispossessed by some third person claiming the property, this right was recognized before the Act came into force.⁴ Where he was dispossessed of part of the property, a proportionate part of the money was adjudged to him.⁵ Where the instrument of mortgage gives the mortgagee the right to possession for a certain period at the expiration of which the property is to be restored without any payment being made, it is considered that this section does not apply and that the only remedy for the breach of contract by the mortgagor in failing to deliver possession of the whole of the land is by an action for damages.⁶

The opinion has been expressed in Allahabad that the dispossession of the mortgagee does not give him a right of action under this clause, though under clause (b) it may do so, if due to the wrongful act or default of the mortgagor; but it seems more reasonable to suppose that the deprivation mentioned in the latter clause refers to title, while the possession of the mortgagee is protected by clause (c) only, and the distinction which is drawn between deprivation of possession and failure to secure

Rights of mortgagee on dispossession.

¹ *Dulhi v. Bahadur*, 7 N. W. P., 55; *Ishan Chundra v. Sujan*, 7 Beng. L. R., 14; *Ganesh Singh v. Sujhari*, 1. L. R., 10 All., 47.

² *Saravana v. Chiunnammal*, 1. L. R., 15 Mad., 65; *Manesh Sing v. Chanharija*, 1. L. R., 4 All., 245; *Vayalil v. Valia*, 2 Mad. H. C., 315; *Oodit Parkash v. Martindell*, 4 Moo. I. A., 444.

³ *Ilkmatulla v. Imam Ali*, 1. L. R., 12 All., 203.

⁴ *Jhabhu Ram v. Girdari*, 1. L. R., 6 All., 289; *Bhugwan v. Gobind*, 1. L. R., 9 Cal., 234; *Dhondo v. Balkrishna*, 1. L. R., 8 Bom., 190.

⁵ *Pitambur v. Ram Sarun*, 25 W. R., 7.

⁶ *Visvalinga v. Palaniappa*, 1. L. R., 21 Mad., 1.

possession without disturbance is not easy to appreciate.¹ In the case referred to, the dispossession was effected by a purchaser of the equity of redemption and was clearly not traceable to any wrongful act or default of the mortgagor. And the same observation applies to a Madras case in which the mortgagee was dispossessed by the purchaser at a sale in execution of a decree obtained against the mortgagor. It was held for this reason that no action would lie under clause (b), and further that the mortgagor was not liable under clause (c), because that clause must be read as referring to persons having title and not so as to include third persons who are mere trespassers.² If this view is correct, it follows that a usufructuary mortgagee, who is ejected by a stranger having in fact no title and thus deprived of his security, has no personal remedy against his mortgagor, unless he can maintain an action on the covenant for title (section 64 (a)), or on the covenant to enable the mortgagee to defend the mortgagor's title (section 65 (b)). The only course open to him is to risk an action against the trespasser with the hope, if successful, of adding the costs to his mortgage-money, (section 72 (c)). In England no doubt the covenant for quiet enjoyment protects the mortgagee only against interference on the part of persons lawfully claiming the property. On the principle that such covenants should be construed so as to give effect to what may reasonably be supposed to be intended by the parties, the covenant is not treated as a warranty securing the mortgagee against the acts of mere trespassers. The mortgagee has however his remedy on the covenant for payment of the mortgage-money. Here the usufructuary mortgagee does not possess that remedy, and, if there is no covenant for quiet enjoyment, there is no question as to the intention of the parties.

The question is as to the intention of the Legislature as expressed in the clause. On the one hand, in favour of a qualified interpretation of the clause, it may be said that, there is no apparent reason why a mortgagee who thus loses his security should be more favourably treated than the mortgagee who is otherwise deprived of his security and has to rely on clause (a), and also that it may be difficult to qualify the expression 'without interruption' in section 108 (c) when the words 'without disturbance' by the mortgagor or any other person in this clause have a liberal and unrestricted meaning put upon them. On the other hand there is the significant omission of the word 'lawful', which is found in the statutory covenant given in the Conveyancing and Law

1 *Hira Lal v. Ghasitu*, I. L. R., 16 All., 318, 323, where the decision in *Thabhu Ram v. Girdhari Singh* is criticized.

2 *Gopalasami v. Arunachella*, I. L. R., 16 Mad., 304, followed in *Nakchedi v. Ram Charitar*, I. L. R., 19 All., 191.

of Property Act, 1881, and there is the fact that the usufructuary mortgagee may, but for this clause, be dispossessed and practically left without any remedy or security; whereas, if the property were destroyed by grave accident, he would have recourse to the mortgagor under the last paragraph of the section.

Note 4. This paragraph provides for the accident of flood, fire, or the like destroying the property wholly or partially without any fault on the part of either party.

*Destruction, &c.,
of security.*

The mortgagor must either furnish other sufficient security or repay the mortgage-money. In a case decided in Bombay where a mortgaged house, being in the possession of the mortgagee, was burnt down accidentally, it was held that he was entitled to a personal remedy. "A creditor in whose hands a pledge has perished "by accident and without negligence on his part is entitled to proceed "against his debtor personally for recovery of the debt."¹ Where the mortgaged property is without the mortgagee's assent transmuted into another form, the right attaches to the property in the new form. His security is not destroyed by the transmutation.² The paragraph clearly would not be applicable if the destruction of the premises were due to the negligence of the mortgagee in possession, nor, is apprehended, if he were under a covenant to repair."³ Nor again does it apply to the case of the land being compulsorily taken under the Land Acquisition Act. A sale under that Act alters the nature of the security but does not effect a destruction of the property.⁴ As to the lien of the mortgagee on the proceeds of sale for arrears of rent or revenue, see section 73.

- [1] **69.** A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling in default of payment of the mortgage-money, the mortgaged property, or any part thereof, without the intervention

*Power of sale
when valid.*

¹ *Vithoba v. Chotalal*, 7 Bom. H. C., (A. C.), 116; *Shoe Golam v. Roy Dinkur*, 12 W. R., 215.

² *Fisher on Mortgages*, 4th ed., p. 810; *Byjuath v. Ramooddeen*, 21 W. R., 223; s.c., L. R., I. A., 106, stated above in note to section 64; *Hem Chander v. Thaku Moni*, I. L. R., 20 Cal., 533; and compare section 49.

³ See *Venkateshwara v. Kesava*, I. L. R., 2 Mad., p. 192; compare section 108 (o) and note.

⁴ *Arunnugam v. Sivagnana*, I. L. R., 13 Mad., 821; as to this and other cases of substituted security see note to section 73.

of the Court, is valid in the following cases and in no others (namely)¹ :—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette;²

(b) where the mortgagee is the Secretary of State for India in Council;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi or Rangoon.

But no such power shall be exercised unless and until— [2]

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of [3] such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

¹ The words "and in no others" were added to this paragraph by the Amendment Act, III of 1885, section 5.

² The words 'or a member . . . Gazette' were added to this paragraph by the Amendment Act, III of 1885, section 5.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under section fifty-seven of a sum to meet any prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in sections six to nineteen (both inclusive) of the Trustees' and Mortgagees' Powers Act, 1866,¹ shall be deemed to apply to English mortgages, wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette.

"Commentary.

Note 1. Except in the cases denoted and in cases to which the Act is not applicable, it is now clear that a power, given *Power of sale.* to the mortgagee of selling without the intervention of the Court, is invalid. Independently of the Act it seems to be an open question whether such a power is permissible in the case of mofussil mortgages. In Bengal there is authority against the exercise of the power, but in a later case on the point the Court expressed a

¹ These sections of Act XXVIII of 1866 are printed in Appendix I.

doubt whether if it had been necessary to go into the question, they could adopt the same view.¹ In a case that came before the Privy Council the mortgage-deed contained a clause empowering the mortgagee, "If any obstruction be caused either by me or my men in respect of any of the conditions aforesaid, you are competent to give me two months' notice, and if I do not within that term fulfil the conditions entered into with you, to sell by auction by yourself the said Muttah Zemindaree and all other mortgaged property or portions thereof according to your pleasure, to pay yourself at once the principal due to you, and the interest payable on the full amount of principal for the unexpired portion of the 12 years, and to deliver to me the remainder, if any." On the interest falling into arrears the mortgagee gave notice under the clause, and brought a suit claiming the full amount of the mortgage-money with interest for twelve years. The Judicial Committee held that the clause conferring the power was of a penal nature, and that it was therefore not enforceable on mere default in payment of interest.² On the other hand, the High Court of Bombay held in 1875 that a sale effected under a power of sale contained in a deed mortgaging certain mofussil property to a bank was valid and effectual, proper notice having been given to the mortgagor and the sale having been fairly conducted.³ In another case where the mortgage was in the English form, the mortgaged property being in the mofussil and the parties residing in Bombay, the same Court considering that a power of sale contained in the mortgage-deed was governed by English law, held that the mortgagee was at liberty to exercise it and did not lose this remedy on the mortgagor's filing a suit to redeem, and added "the owner of the equity of redemption can only stay the sale *pendente lite* by paying the amount due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner, contrary to the terms of the mortgage."⁴

Where an effectual power of sale is given to mortgagees under the section, it may be presumed that an injunction to restrain its exercise will be granted only on these principles.

In England the power to sell, if not given expressly, is conferred on the mortgagee by the Conveyancing Act, 1881. Like this section, the statute gives power to sell, or to concur with any other person in selling, the mortgaged property or any part thereof. In the case of a mortgage

1 Bhanoomutty v. Premchand, 15 Beng. L. R., 28; s.c., 23 W. R., 96.

2 Venkatavarada v. Venkata, 23 W. R., 91.

3 Pitamber v. Vanmali, I. L. R., 2 Bom., 1; see Keshavram v. Bhavanji, 8 Bom. H. C., (A. C.), 142; Bulakhi v. Tuka Rambhat, I. L. R., 14 Bom., p. 380.

4 Jagjivan v. Shridhar Balkrishna, I. L. R. 2 Bom. 252

of premises, having machinery upon them, which, according to section 6, sub-section 2 of the same statute, passed with the land as fixtures, it was contended that the mortgagee was at liberty to sever the fixtures and sell them apart from the land. The contention was not allowed to prevail, for, in the opinion of the Court of Appeal, 'any part thereof' meant any part of the mortgaged property which was land. The power of sale may be so worded as to authorize the separate sale of fixtures, but otherwise it is not competent to the mortgagee of a house to dismantle it and sell the fixtures separately.¹

Note 2. The two clauses provide for two alternatives. When default in payment of the principal is made the occasion for exercising a power of sale, notice served three months previously is required. When it is interest that is in arrears, no notice is required; it is enough that the sum exceeds Rs. 500 and has been due for three months. Clause (1) must be read into any instrument of mortgage conferring a power of sale. The absence of any stipulation for notice or the mention of a shorter period than three months are alike immaterial and do not affect the power of sale.²

Clauses (1) and (2) are taken from the Conveyancing Act, 1881, section 20,³ the first part of that section being identical with clause (1) while the remaining provisions are as follows:—

"Unless and until some interest under the mortgage is in arrears and unpaid for two months after becoming due, or there has been a breach of some provision contained in the mortgage-deed or in this Act and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon."

Independently of the Conveyancing Act, it has been said in England that a power of sale without notice to the mortgagor is of an oppressive character; it is however usual to stipulate for notice where an express power of sale is given,⁴ and the ordinary stipulation is that notice be given to the mortgagor or his assigns. A notice given to the mortgagor after he had assigned his equity of redemption to a third person could not be deemed valid against the latter.⁵ Of course the mortgagor cannot

¹ *Sonthport Co. v. Thompson*, 37 Ch. D., 64; *Hawtry v. Butlin*, L. R., 8 Q. B., 290; *Batchelder v. Yates*, 38 Ch. D., 112; *Ex parte Barclay*, L. R., 9 Ch., 577; see section 8.

² *Madras Deposit Society v. Passanha*, I. L. R., 11 Mad., 201.

³ 44 & 45 Vic., c. 41.

⁴ *Miller v. Cook*, L. R., 10 Eq., 641; *Fisher on Mortgages*, 4th ed., p. 464.

⁵ See *Muncherji v. Noor Mahomedbhoy*, I. L. R., 17 Bom., 711; *Hoole v. Smith*, 17 Ch. D., 434.

object to a sale for want of due notice, if he has waived notice or consented to dispense with it.¹

Note 3. The two following paragraphs are taken almost *verbatim* from section 21 (2) and (3) of the above statute; the next paragraph, saving powers conferred before this Act comes into force, would seem in view of section 2 (c) to be superfluous.² The words saving the purchaser from any impeachment of the sale "on the ground that no case had arisen to authorise the sale," would presumably cover a case where the power of sale was exercised, although the mortgage-money was paid off. A sale made under a mortgage containing a similar clause to a purchaser in good faith has been held to be valid even though the security proved to have been satisfied.³ In cases to which the clause is thus applicable the Court will not grant an injunction to stop a sale.⁴ Where the mortgagee with the consent of the mortgagor becomes the purchaser on a sale under a power, the effect is to create a merger of the equity of redemption in his favour and to vest in him an unimpeachable title which overrides and is altogether distinct from his title as incumbrancer.⁵ This indeed is the result of his acquiring the mortgagor's right under any circumstances.

A mortgagee, exercising his power of sale in good faith and without collusion with the purchaser, is not, except as to the balance of the purchase-money, a trustee for the mortgagor so as to be answerable for the disadvantageous result of a sale; and the mortgagor cannot, therefore, claim credit for the real value of the property over and above the price which it has fetched.⁶ With regard however to the surplus proceeds in his hands the mortgagee is virtually a trustee for the mortgagor, or persons deriving title from him.⁷ The position of things is wholly different from that which arises when mortgaged property is sold under a mortgage-decree, for in that case the property is not sold free from incumbrance and the second mortgagee, who has not been made a party to the mortgagee's suit, is not precluded by the sale from prosecuting his remedies against the property.⁸

1 *In re Thompson & Holt*, 44 Ch. D., 492.

2 See *ante* p. 4.

3 *Dicker v. Angerstein*, 3 Ch. D., 600.

4 *Mancherji v. Noor Mahomedbhoy*, 1 L. R., 17 Bom., 711.

5 *Purmanand Das v. Jannabai*, 1 L. R., 10 Bom., 49; and see *Heath v. Pugh*, 6 Q. B. D., p. 360, *per* Selborne, C.; s.c., 7 App. Cas., 235.

6 *Warner v. Jacob*, 20 Ch. D., 220, see note to section 97.

7 See *Lall Doss v. Jamal Ali*, Beng. L. R., Sdp. Vol., 901; s.c., 9 W. R., 187; *Jajit v. Gobind*, 1 L. R., 6 All., 303.

8 See *Yenkata v. Kannam* and other cases cited in note to section 85.

It has been held in England that a mortgagee having a surplus in his hands is bound, if he cannot ascertain to whom to pay it, to set it apart in such a way as to be fruitful for the benefit of the persons beneficially entitled to it, and he may accordingly be charged with interest from the date of the completion of the sale. To that extent he stands in a fiduciary position to the persons entitled.¹ In calculating the amount due to him the mortgagee is entitled to take credit for arrears of interest, though by reason of the law of limitation they could not be recovered. The right of retainer is not affected by limitation.²

The last paragraph of the section contains a declaration that certain provisions of Act XXVIII of 1866 are applicable to all English mortgages in which an express power of sale would be valid under clause (a) of the present section.³

70. If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Accession to mort-
gaged property.

Illustrations.

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

Commentary.

The general principle of the English law on this subject has been said by the Privy Council to be that:—

“Most acquisitions by a mortgagor accrue for the benefit of the mortgagee increasing thereby the value of his security: and, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property or substitutions for it, and therefore subject to redemption.”⁴

¹ *Charles v. Jones*, 35 Ch. D., 545; followed in *Haji Abdul v. Haji Noor Mahomed*, I. L. R., 16 Bom., 141.

² *In re Marshfield*, 34 Ch. D., 721; *Edmunds v. Waugh*, L. R., 1 Eq., 418; *Daudbhai v. Daudbhai*, I. L. R., 14 Bom., 113, and cases in *Shepherd's Limitation*, p. 179.

³ For the provisions of the Act referred to, see Appendix I.

⁴ *Kishendatt v. Rajah Mumtaz*, I. L. R., 5 Cal., 210; s.c., L. R., 6 I. A., 145; see also *Fisher on Mortgages*, 4th ed., pp. 72, 296. As to the other branch of the rule, see section 63, and note.

The rule laid down in the section is applicable, as appears from the illustrations, whether the accessions are natural or otherwise. They can however, as it seems, be prevented from becoming part of the security by special terms in the mortgage-contract.¹ In the absence of such special terms, when the mortgaged property is described by name only, as in the case of a village, and it is increased or diminished in size, e.g., by the decision of a survey officer, the extent subject to be held by the mortgagee and redeemed by the mortgagor will be regulated by such decision.² Where the accessions are the result of expenditure by the mortgagee, the question whether he is entitled to be reimbursed must be decided in the redemption-suit on an account being taken.³ When accessions have accrued to the mortgage-security they will enure to the benefit of any subsequent mortgagees on the redemption of the first mortgage.⁴

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Renewal of mort-
gaged lease.

Commentary.

When the property mortgaged is leasehold and the mortgagor renews the lease, "the new lease will be held to be a graft on the old "one and subject in equity to the same mortgage which affected the old "lease."⁵ And this is the rule whether or not the new lease is given in accordance with a covenant to renew. According to English law when a mortgagor obtains any interest of like nature with a new lease, or purchases the reversion in fee, thus making the renewal of the lease impossible, the interest or estate so acquired becomes equally subject to the mortgage. No provision is made in the Act for this case, or for the case of the mortgagor surrendering his lease. But on the principle involved in section 115 the surrender should not be permitted to prejudice the existing incumbrance, and so it has been held in England.⁶ A renewal by the mortgagee is expressly provided for by section 64 which

¹ Ganpatji v. Saadat, I. L. R., 2 All., 787.

² Sadashiv v. Vithal, 11 Bom. H. C., 32

³ Bahshiram v. Darku, 10 Bom. H. C., 369.

⁴ Fisher on Mortgages, 4th ed., p. 296.

⁵ Leigh v. Burnett, 29 Ch. D., 231; Fisher on Mortgages, 4th ed., p. 296.

⁶ *Ib.*

declares that the mortgagor on redemption shall, in the absence of a contract to the contrary, have the benefit of the new lease; and such a case is also covered by section 90 of the Indian Trusts Act.¹

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

Rights of mortgagee in possession.

- [1] (a) for the due management of the property and the collection of the rents and profits thereof;
- [2] (b) for its preservation from destruction, forfeiture or sale;
- [3] (c) for supporting the mortgagor's title to the property;

(d) for making his own title thereto good against the mortgagor; and

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine per cent. per annum.

- [4] Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

¹ See note to section 64, and *Kishendatt v. Rajah Mumtaz*, 1 L. R., 5 Cal., 198; s.c., L. R., 6 I. A., 145; *Fisher on Mortgages*, 4th ed., 297.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Commentary.

This section sets out the purposes for which the mortgagee in possession may spend money with the right to add the amount expended to the mortgage-debt. Section 76, on the other hand, declares the liabilities which attach to him by virtue of his possession, and clauses (c) and (d) specify the purposes on which he must spend moneys out of the income of the mortgaged property.

Note 1. (a) The due management of the property, to which of course the collection of the rents or profits is incidental, enures to the advantage of the mortgagor; he is therefore precluded from redeeming the mortgage without refunding the mortgagee's disbursements on this account.¹ Thus in England if a mortgagee in possession of property employs an agent to manage the estate, he is entitled to charge for his salary, though he may not charge for his own time and labour expended in the same way;² and in this country a similar allowance is made.³

Note 2. (b) While under section 76 (d) the mortgagee is bound to make such repairs as can be paid for out of the profits remaining after his interest and certain other charges have been satisfied; under this clause he is at liberty to spend money for the maintenance of the property and the protection of the title. "He need not rebuild ruinous premises and "increase his debt by laying out large sums beyond the rent." On the other hand, he "will be allowed for proper and necessary repairs to the estate, and, if buildings become ruinous so as to be unfit for use, he "may complete or pull them down and rebuild. And the rebuilding or "repairing may be done in an improved manner and more substantially "than before, so that the work be done providently, and that no new or "expensive buildings be erected for purposes different from those for "which the former buildings were used."³ This passage was cited with approval by Couch, C.J., in a case where a charge for repairs necessitated

1 Fisher on Mortgages, 4th ed., p. 871.

2 *Rajah Heera v. Sahoo*, 1 S. D. A., N. W. P., 417 (1858).

3 See Fisher on Mortgages, 4th ed., p. 865; the passage as it stands is taken from 2nd ed., p. 887.

by a fire, though it amounted to more than double the price paid on a conditional sale of the property, was allowed by a Court.¹ Similarly, where the property consisted of a thatched house and repairs were executed to prevent it from becoming uninhabitable.² Improvements, although reasonable and permanent in character can hardly be necessary for the preservation of the property, and therefore the money expended upon them cannot, in the absence of contract, or of assent on the part of the mortgagor, be added to the mortgage-money.³ The mortgagee in possession is as regards improvements in no better position than a lessee. This statement of the law is supported by the language used in *Sandon v Hooper** where Lord Langdale appears to distinguish money spent on necessary repairs, or for the protection of the mortgagor's title, from money spent on improvements and to hold that for the latter the mortgagor cannot be charged unless acquiescence is established. But in a case reported⁵ after the passing of this Act the language of Lord Langdale was disapproved, and it was held that, while the mortgagor must not be improved out of his property by an unreasonable expenditure, the mortgagee is entitled to be repaid the cost of improvements so far as the value of the property has been increased thereby, the improvements being reasonable and appropriate in regard to the nature and value of the property. *Shepard v. Jones*, it should be mentioned, was not a redemption suit, but a suit by the mortgagor for an account of the proceeds of sale effected by the mortgagee under his power of sale and the question was whether the increase of the property, brought about by the mortgagee at his own cost, could be appropriated by the mortgagor without paying for the outlay. It would be difficult to answer that question otherwise than in the negative. The case is also an authority for the position that, while mere notice to the mortgagor will not render him liable to a charge which is otherwise inadmissible, the conduct of the mortgagor may be evidence of acquiescence on his part. Here, under section 63, assent on the part of the mortgagor has to be proved.⁶

In a case where the mortgagee, although not in possession, advanced money in payment of Government revenue to save the estate from sale, the opinion was expressed by the Privy Council that he might in suing

1 *Mancharsha v. Kamrunisa*, 5 Bom. H. C., (A. C.), 109; *Ragho Anaji*, 5 ib., 116; *Lakshman v. Hari Dinkar*, I. L. R., 2 Bom., 584.

2 *Jogendronath v. Raji Narain*, 9 W. R., 488.

3 See section 63, *Arunachetty v. Sithagi*, I. L. R., 19 Mad., 327.

4 6 Beav., 246.

5 *Shepard v. Jones*, 21 Ch. D., 475.

6 *Durga Singh v. Namany*, I. L. R., 17 All., 282.

to enforce the mortgage, have tacked to it the amount so advanced by him on account of revenue.¹

The clause, adopting the rule previously recognised, covers the case of the mortgagee in possession, paying Government revenue or other dues to save the land from sale. The money so expended he may add to the mortgage-money.² For other persons making similar payments no provision is made in this Act. But in the Bengal Tenancy Act it is declared that a mortgagee, whose interest in the holding could be voidable upon a sale made under that Act, may pay the amount requisite to prevent the sale, and his mortgage shall take priority of every other charge on the holding, and he shall be entitled to possession as until the debt with interest has been discharged.³ By Act II of 1864 (Madras),⁴ section 35, the mortgagee or other incumbrancer of land, threatened with attachment for arrears of revenue, is empowered to pay off the arrears with the consequence of becoming a creditor of the defaulter and having a charge upon the land. But this charge "shall only take priority over other charges according to the date at which payment was made." In a case where there was an express covenant obliging the mortgagor to pay the revenue and payments were on his default made by the mortgagee, it was held that the latter having already brought an action on the covenant and obtained a decree was not entitled in a redemption suit to charge against the mortgagor the moneys paid by him and reasonable under his decree. It was considered inequitable that the mortgagee having adopted one remedy should afterwards be allowed to enforce another against the mortgagor.⁵

As to the question whether other persons not in the position of mortgagees are so entitled, there is a difference of opinion. From the language used in some cases it would seem that such a charge could be claimed by any person interested in the land. Thus in an Irish case Lord St. Leonards observes:—

"In Ireland it is a very common equity to have, as a prior charge to all other incumbrances, what is called salvage-money. Where a leasehold estate, or an estate held for lives to which half-a-dozen people are entitled in succession, many of them being mortgagees according to certain priorities, the last man of all who

¹ *Nugenderchunder v. Sreemutty*, 11 Moo. I. A., 241, followed in *Mohesh Chunder v. Ram Parsono*, I. L. R., 4 Cal., 539. See *Laohman Sing v. Salig Ram*, I. L. R., 8 All., 385; *Anandi v. Dur Najaf*, I. L. R., 13 All., 195; *Kamaga v. Devapu*, I. L. R., 22 Bom., 440.

² *Girdhar Lal v. Bhola Nath*, I. L. R., 10 All., 611.

³ Act VIII of 1885, section 171; see *Kinnu Ram v. Mozaffer*, I. L. R., 14 Cal., p. 817.

⁴ Revenue Recovery Act (Madras); see *Seshagiri v. Pichu*, cited *post* p. 257

⁵ *Imdad Hasan Khan v. Badri Prasad*, I. L. R., 20 All., 401.

"is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord who otherwise would have recovered the estate, and taken it from everybody; this payment is what is called salvage-money. This is an established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because so far as any interest is left to anybody beyond the charge, it is acquired by that payment, in the shape of redemption-money."¹

But this doctrine of salvage-lien, founded on the analogy of maritime law, is decisively rejected in recent English cases, and Lord St. Leonards' words quoted above are explained by reference to the peculiar practice in the Irish law of conveyancing.²

In *Leslie v. French* the question was discussed with reference to payments of premium made in order to keep alive a policy of insurance, and it was said that a lien on the policy might be created on account of such payments in four cases³ :—

"First.—By contract with a beneficial owner of the policy.

"Secondly.—By the right of trustees to an indemnity out of their trust property for money expended by them in its preservation.⁴

"Thirdly.—By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property.

"Fourthly.—By reason of the right vested in mortgagees or other persons having a charge upon the policy, to add to their charge any money which have been paid by them to preserve the property."

Adverting to this case and the others above cited, a Full Bench of the High Court of Bengal held that a co-sharer paying the whole revenue in order to save the estate does not thereby acquire a charge on the shares of his defaulting co-sharers against them or a purchaser from them.⁵ In a recent case a co-sharer who was also *lambardar*, having obtained in a Revenue Court a decree against his co-sharers for revenue paid by him in 1882 and subsequent years, brought a suit against a person claiming under a mortgage executed in 1873 by his co-sharers, asking to have his lien "which is on account of Government declared superior and preferential to the hypothecation lien in favour of the defendant" and praying for a sale accordingly. In an elaborate judgment dismissing the suit, Edge, C.J., expressed his agreement with the view entertained by the High Court of Bengal. He points out that the plaintiff was really claiming to be placed in a position higher than that

¹ *In re* *Tharp*, 2 Sm. & Giff., 578: see also *Leslie v. French*, 23 Ch. D., 552.

² *Falcke v. Scottish Imperial Insurance Co.*, 31 Ch. D., 234, 254; *Leslie v. French*, 23 Ch. D., p. 563.

³ 23 Ch. D., pp. 552, 560.

⁴ See Indian Trusts Act, section 32.

⁵ *Kinnu Ram v. Mozaffer*, I. L. R., 14 Cal., 809.

of a second mortgagee relatively to the first mortgagee, and holds that the claim founded on the doctrine of salvage is at variance with the principles disclosed in this and other Acts of the Legislature. In an equally elaborate judgment Mahmood, J., dissenting expressed his adherence to the view held by some of the learned Judges of the Bengal Court and held on principles of justice, equity, and good conscience that the plaintiff was entitled to a salvage-lien which could be enforced as a first charge on the property.¹ This opinion is approved in Bombay,² and in Madras.³ In the Madras case where the owner of the part of lands held on raiyatwari tenure under one patta paid the revenue in order to save the lands from sale and then sued the other owners for contribution, he was held entitled to a charge on the land in the defendant's possession. Muttusami Ayyar, J., based his judgment on the ground that the plaintiff had, by paying the revenue, freed the land from a statutory charge, and was no less entitled to the benefit of the charge than if he had advanced money to satisfy a prior mortgage.⁴ This application of the doctrine of subrogation is commented on by Edge, C.J., in the case above cited, as also by Mahmood, J., who observes that he does not rest his decision on it, for the reason that the plaintiff could not by payment of the revenue acquire the right of enforcing his lien according to the methods available under the Revenue Act to the revenue authorities.⁵

Note 3. (c), (d) (e). The rules contained in these clauses hold good in England. There it is held that a mortgagee is entitled to allowance in respect of moneys paid for the redemption of land-tax, or in perfecting and protecting the mortgagor's title, and in supporting it when it has been impeached. He is further entitled, whether or not he is in possession, to add to the mortgage-money the necessary expenses of defending his own title against the mortgagors, for instance, the cost of an action brought by the mortgagor to set aside the mortgage and dismissed with costs.⁶ But he is not entitled to the costs of defending his title to the mortgage

1 Seth Chitor v. Shib Lal, I. L. R., 14 All., 273.
 2 Achut Ramachandra v. Hari, I. L. R., 11 Bom., 313.
 3 Seshagiri v. Pichu, I. L. R., 11 Mad., 452; see Thanikachella v. Shudachella, I. L. R., 15 Mad., 258.
 4 Seshagiri v. Pichu, I. L. R., 11 Mad., p. 458. It is very doubtful whether the case of second mortgagee paying off a prior mortgage in order to prevent a sale comes within this section so that the former can claim as for salvage, for section 74 relates to such a case.

5 Seth Chitor v. Shib Lal, I. L. R., 14 All., pp. 295, 332

6 Eardley v. Knight, 41 Ch. D., 537

against a third person.¹ The right of the mortgagee under clause (e) is, it may be observed, independent of any covenant by the mortgagor to renew, and does not carry with it the power of compelling the mortgagor to renew.²

Note 4. The paragraphs of the section dealing with the insurance of mortgaged property are borrowed from the *Insurance of the property.* Conveyancing Act, 1881.³ Before legislative provision was made for them, the rights thus given to the mortgagee were usually stipulated for in English mortgage-deeds: in their absence the mortgagee could not tack insurance-premiums paid by him against a second mortgagee, and of course he will not now be entitled to do so when the operation of these paragraphs has been excluded by special terms in the contract.⁴ For the rules as to the destination of the insurance-money see section 76 (f).

It is competent to the mortgagee to stipulate that in case of the accidental destruction of the premises the mortgagor shall rebuild or allow him to do so at the mortgagor's cost. With a mortgage on these terms the mortgagor can redeem only on paying the cost incurred by the mortgagee in rebuilding the house.⁵ Under the usual covenant for insurance the mortgagee enjoys a similar right in respect of the premiums paid by him to keep up the policy.

73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereof of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

Charge on proceeds of revenue sale.

Commentary.

Generally the duty of paying revenue and rent falls on the mortgagor or mortgagee according as the one or the other is in possession. The section declares the law as previously laid down with regard to the right of the mortgagee to the surplus proceeds of a sale of the property

1 *Pokree Saheb v. Pokree Beary*, I. L. R., 21 Mad., 32; *Fisher on Mortgages*, 4th ed., pp. 861, 862.

2 *Id.*; see section 65 (d).

3 44 & 45 Vic., c. 41, sections 19 (ii.), 23 (1), (2).

4 *Fisher on Mortgages*, 4th ed., p. 862.

5 *Sakharamshot v. Amtha Devji*, I. L. R., 14 Bom., 28

free from all incumbrances under the provisions of the Revenue Acts. Such sales are made free from incumbrances, and so they have as their result that nothing is left except the surplus proceeds to represent the mortgagee's security. The proceeds of the sale, being substituted for the mortgaged property, become subject to the lien to which that property was subject.¹ So if land is sold compulsorily under the Land Acquisition Act the proceeds are treated as mortgaged property.² Similarly on the sale for arrears of rent of a patni taluk under the Regulation VIII of 1819 (Bengal), the surplus proceeds, whether in the hands of the Collector or of creditors of the mortgagor, are available to satisfy the mortgagee's claim.³ In the case of compulsory sale, where the property is sold subject to incumbrances, *e.g.*, sales under the Madras Rent Act⁴ and under section 13 of Act XI of 1859,⁵ while, on the one hand, the mortgagee does not in consequence of the sale lose his lien on the land, there is, on the other hand, no reason why he should have a charge on the proceeds. The section does not apply to such cases.⁶ In addition to the above cases of substituted security the cases where after the date of the mortgage a partition has taken place may be noted. In *Byjnath v. Ramoodeen*⁷ the property mortgaged consisted of two mouzabs, in lieu of which, by a partition effected for revenue purposes under Regulation XIX of 1864, the mortgagor became entitled in severalty to the whole of one of the two mouzabs and to other land not mentioned in the mortgage. In the Court of first instance the mortgagee obtained a decree for the mouzah and other land so specifically allotted to the mortgagor. This decree which was reversed in the High Court was restored by the Judicial Committee, it being held that, while the mortgagee was entitled to take the subject of the pledge in the new form

1 *Heera Lall v. Janokeenath*, 16 W. R., 222; *Kristodass v. Ramkant*, I. L. R., 6 Cal., 142; *Douglas v. Collector of Benares*, 5 Moo. I. A., 271.

2 *Viraragava v. Krishnasami*, I. L. R., 6 Mad., 344; *Balhaji v. Magpiram*, I. L. R., 21 Bom., 396: See *Baramal v. Tajammal*, I. L. R., 16 All., 78, where a mortgagee omitted to claim compensation under the Act.

3 *Gosto Behary v. Shib Nath*, I. L. R., 20 Cal., 241.

4 Act VIII of 1865; *Rajagopal v. Subbaraya*, I. L. R., 7 Mad., 31, overruling *Munisami v. Dakshanamurthi*, I. L. R., 5 Mad., 731; *Subramanya v. Rajaram*, I. L. R., 8 Mad., 573; as to Bengal see *Shahaboodeen v. Futteh*, 7 W. R., 260, and Bengal Act VIII of 1885, Chapter XIV.

5 *Premchand v. Purnima*, I. L. R., 15 Cal., 546.

6 See note to section 76 (c) and *Beni Prosad v. Rewat*, I. L. R., 24 Cal., 746.

7 I. L. R., 1 I. A., 106, explained in *Hriday v. Mohobutnessa*, I. L. R., 20 Cal., 285. ¹

If after decree for redemption the mortgaged property is allotted on partition to any individual, that person is entitled to the mortgage-money against the plaintiff in the suit, *Ganshimal v. Hamirmal*, I. L. R., 21 Bom., 747.

which it had assumed, he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers, since the mortgagee, taking an undivided share by way of security, took it subject to the right of the other sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. This case was followed in a case where the partition was effected by a decree to which the mortgagee of an undivided share in a certain land was no party. Under the partition that land was allotted to a third party and other land was allotted to the mortgagor. It was held that the mortgagee must proceed against this latter property only and not against the land which had been allotted to a third party.¹

The effect of the proviso must be that, if the sale has been occasioned by the mortgagee's default, he has no charge of the surplus. If the mortgagee makes default in payment of the revenue and himself purchases the property at the sale, it is clear that he becomes a trustee for the mortgagor and that the right to redeem remains unaffected.²

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Commentary.

The present section deals only with one case, *viz.*, that of a second or later mortgagee in relation to the incumbrancer immediately prior to him.³ When the second mortgagee has paid off the first and obtained

1 Hem Chunder v. Thako Moni, I. L. R., 20 Cal., 533.

2 Balkrishna v. Madharav, I. L. R., 5 Bom., 73; Kalappa v. Shrivaya, I. L. R., 20 Bom., 492; Jenu v. Sakharav, I. L. R., 22 Bom., 273; see section 90. Trusts Act, and illustration (c).

3 For observations on this section, see Sirbadh Rai v. Raghunath, I. L. R., 7 All., p. 574; *per* Oldfield, J., Koopmia Sahib v. Chidambaram, I. L. R., 19 Mad., 105; see also Teevan v. Smith, 20 Ch. D., 724.

the necessary receipt, he stands in the place of the first mortgagee. The supposition is that the prior mortgage is kept alive for the benefit of the second mortgagee. He does not acquire a new charge on the property, but he becomes in effect assignee of the rights which the first mortgagee then possessed, and therefore if any part of the mortgaged property has been released from the mortgage his right can prevail against the remainder only.¹ The doctrine of tacking not being admitted as between incumbrancers *inter se*, it is obvious that a third mortgagee paying off the first cannot thereby improve his position with respect to his original mortgage (see section 80). The right of the second mortgagee to make a tender to, and require a receipt from, the prior mortgagee arises only when the money due on the prior mortgage has become payable;² and therefore it cannot be exercised under circumstances in which the mortgagor could not equally insist on paying off the mortgage-money. If the first mortgagee is entitled to notice from the mortgagor, he is no less entitled to it from the second mortgagee. Similarly if the prior mortgagee is entitled to possession of the property for a certain period, he cannot be redeemed by the subsequent mortgagee until the expiration of that period.³ The receipt, if it be a receipt and nothing more, would not require registration.⁴ On the prior mortgagee refusing to give a receipt, there can be no course left except to sue for redemption, in which suit, if the tender was a proper one, the prior mortgagee would forfeit his right to costs.⁵ It is clear that this section does not apply when the first mortgagee has been satisfied and extinguished on the execution of the second and the second mortgage is alone outstanding.⁶

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Commentary.

It is competent to a mortgagor to deal with the interest remaining in him and transfer it by sale, mortgage or lease to other persons, but not

1 Muhammad Mahmud v. Kalyan Das, I. L. R., 18 All., 187.

2 See *ante* p. 208.

3 Akhara v. Saba Lal, I. L. R., 18 All., 83.

4 See *ante* p. 213.

5 See note on 'costs' under section 86; Fisher on Mortgages, 4th ed., 915.

6 Koopmis Sahib v. Chidambaram, I. L. R., 19 Mad., 105.

Rights of mesne mortgagee against prior and subsequent mortgagees.

so as to prejudice the interests of the mortgagee,¹ the result of such a transfer being that the transferee acquires as against the first mortgagee all the rights of the mortgagor.² The account to be taken at the instance of a second mortgagee must be taken in all respects as though the mortgagor himself were taking it.³ Thus when A has mortgaged the property successively to B, C and D; C and D have against B, and D has against C, the same rights as A has under the several mortgages against B, C and D; while C has against D the same rights as he has against A. That is to say, the later can redeem the prior mortgagee, on the same terms on which that mortgagee could himself be redeemed by the mortgagor. If the first mortgagee without joining the second has obtained a decree and bought the property at the sale in execution of it, the second mortgagee is still entitled to redeem on paying off what is due on the first mortgage, not on paying the sum for which the property may have been bought.⁴ The decisions, however, are not uniform as to the course to be adopted in such cases. In a Madras case (1893) it was held that the second mortgagee was as against the defendant who had bought from the first mortgagee, who in his turn had bought at the sale in execution, entitled to sue for sale. The decision was based on the circumstance that the defendant in buying had reserved out of the purchase-money a sum sufficient to pay off prior incumbrances.⁵ For that reason the case was distinguished from *Perumal v. Kaveri*⁶ in which case the same Court held that a second mortgagee in possession under a usufructuary mortgage had no right of action against the first mortgagee who had bought under his decree. This latter decision seems clearly right but the other is more doubtful. This section does not in terms oblige the second mortgagee to exercise his right of redeeming the first, nor make redemption of the first mortgage a condition precedent to enforcement of the second mortgage. In view, however, of other sections of the Act it has been held in Allahabad

1 *Shridhar v. Atmaram*, I. L. R., 7 Bom., 455; *Shridhar v. Krishnaji*, I. L. R., 12 Bom., 272; *Ali Hasan v. Dhirja*, I. L. R., 4 All., p. 524; *Tarn v. Turner*, 39 Ch. D., p. 460.

2 *Khud Chund v. Kalian*, I. L. R., 1 All., p. 244; see *Venkata v. Kannam*, I. L. R., 5 Mad., p. 186; *Sirbadh Rai v. Raghunath*, I. L. R., 7 All., p. 574; *Desai Lalubhai v. Munthar*, I. L. R., 20 Bom., 390.

3 *Mainland v. Upjohn*, 41 Ch. D., 126.

4 *Dip Narain v. Hira Singh*, I. L. R., 19 All., 527; *Sivathi v. Ramasubbayar*, I. L. R., 21 Mad., 64; *Ganga Pershad v. Land Mortgage Bank*, I. L. R., 21 Cal., p. 369.

5 *Narayanasami v. Narayana*, I. L. R., 17 Mad., 62.

6 I. L. R., 16 Mad., 121.

that an order for sale cannot be obtained by a second mortgagee except on his redeeming the prior mortgage. In other words, he is not entitled to have the property sold subject to the prior mortgage.¹ This decision is admittedly in conflict with several others,² and has not been followed in Calcutta,³ or Madras.⁴ The decree for sale may contain a direction that, after satisfaction of the first mortgage, the plaintiff should be paid out of the surplus proceeds.⁵ In the absence of such direction, the decree is open to the objection that it exposes the prior mortgagee to the necessity of bringing another suit. This section does not provide for the rights of a first mortgagee as against second or subsequent incumbrancers. Obviously the rights of the former are the same as they are against the mortgagor. The property is in the hands of the second mortgagee no less liable than it was when the mortgagor's right of redemption remained unincumbered.

Where suits are brought by two successive mortgagees of the same property, and it is sold first under one decree and then under the other, the question as between the two purchasers where one brings a suit for possession against the other must be decided in favour of the purchaser who has first obtained possession. In such a suit the priority is determined not by reference to the date of the mortgage or decree, but by reference to the date of the sale and possession taken under it. Such rights, as the priority in the date of the mortgage may give, must be enforced in another suit.⁶

Liabilities of
mortgagee in pos-
session.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—

(a) he must manage the property as a person of [1] ordinary prudence would manage it if it were his own;

1 *Mata Din v. Kazim*, I. L. R., 13 All., 432, followed in *Akhara v. Suba Lal*, I. L. R., 18 All., 83; *Hira Lal v. Kishan Lal*, I. L. R., 19 All., 543, dissented from in *Kanti Ram v. Kutubuddin*, I. L. R., 22 Cal., 33; see note to section 96.

2 *Sirbadh Rai v. Raghunath*, I. L. R., 7 All., 568; *Raghunath v. Jurawn*, I. L. R., 8 All., 105; *Vencatachella v. Panjanadion*, I. L. R., 4 Mad., 213; *Gangadhara v. Sivarama*, I. L. R., 8 Mad., 246.

3 *Kanti Ram v. Kutubuddin*, I. L. R., 22 Cal., 33.

4 *Narayaniasami v. Narayana*, I. L. R., 17 Mad., 64.

5 *Auhindro v. Chunnoololl*, I. L. R., 5 Cal., 161; *Beni Madhub v. Soudendra*, I. L. R., 23 Cal., 795.

6 *Nanack Chand v. Teluckdye*, I. L. R., 5 Cal., 265; *Dirgopal v. Bolakec*, *ib.*, 269; *Venkatanarasanna v. Ramiah*, I. L. R., 2 Mad., 108.

- [2] (b) he must use his best endeavours to collect the rents and profits thereof;
- [3] (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold;
- [4] (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- [5] (e) he must not commit any act which is destructive or permanently injurious to the property;
- [6] (f) Where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;
- [7] (g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;
- [8] (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

(i) when the mortgagor tenders, or deposits in manner [9] hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

If the mortgagee fail to perform any of the duties imposed upon by him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Commentary.

Note 1. (a) A mortgagee enters into possession for the purpose

“of recovering both the principal and interest, and
Duty of mortgagee in possession. “the estate being in the eye of this Court a security
 “only for the money, the Court requires him to be
 “diligent in realising the amount which is due in order that he may
 “restore the estate to the mortgagor who in the view of this Court is
 “entitled to it.”¹ Acting on the principle thus expressed, the Court of Chancery charges a mortgagee in possession, who has sold the mortgaged property, with the proceeds of the sale received by him or for his use, “or which without his default might have been so received.”² In this respect the position of a mortgagee is that of a trustee. And thus the same measure of prudence is prescribed here as in the Indian Trusts Act. Having once taken upon himself the responsibilities of a mortgagee in possession, he is not at liberty to surrender possession for his own convenience or have a receiver appointed.³ It has been held in this country that a mortgagee in possession is bound to cultivate the ordinary crop which the ground is capable of yielding.⁴ At the same time he is “not an assurer of the continuation of the same rate of profit which his

1 *Kensington v. Bouverie*, 7 De G. M. & G., 131; and see *Fisher on Mortgages*, 4th ed., p. 850; compare liability of bailee under section 150 of the Contract Act.

2 *Mayer v. Murray*, 8 Ch. D., p. 428; *Deonarain v. Naek Pershad*, 2 N. W. P., 217; *Charles v. Jones*, 35 Ch. D., 544; *National Bank of Australasia v. United Hand in Hand Co.*, 4 App. Cas., p. 409.

3 *In re Prytherch*, 42 Ch. D., p. 600.

4 *Girjoji v. Keshavara*, 2 Bom. H. C., 211; compare Contract Act, sections 151 and 152; and see *post* note 8.

"mortgagor was able to raise. Much depends in India on personal qualities. The very change of management and possession may cause a falling-off of receipts. Therefore an estimate of a preceding rental does not suffice to show actual receipts."¹

Note 2. (b) When accounts come to be taken between the parties, the mortgagee may be charged with sums which, in breach of the duty cast upon him by this clause, he has failed to collect.² In taking the account against the mortgagee in possession he is charged with the amount actually received by him in the way of rents and profits or the amount which but for his wilful default he might have received. With an English mortgagee it is optional to take possession or not, as he may choose, and if after taking possession he nevertheless allows the mortgagor to collect the rents, he is not prejudiced except as against other incumbrancers of whose claims he has notice.

"If an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor. He would have a full right to recover his debt by means of the mortgage. The only effect would be when some subsequent incumbrancer came in and he had notice of that claim. In that case the rule and law in England would be that, if after notice he permits the mortgagor to receive the rents and profits he exposes himself to the claim of the second incumbrancer."³

The case in which the principle was thus expressed and applied was heard on appeal from Bombay. By the mortgage instrument it was agreed that the holders should receive the whole of the produce of the mortgaged village, and after allowing for interest the remainder should go for the purpose of liquidating the principal, and they should continue so to receive and appropriate the annual produce until the whole of their demand should be liquidated. The mortgagors further held themselves jointly and severally responsible for the claim whenever the mortgagees might demand their money. Parke, B., in giving judgment, said :—

"If there is a binding contract, binding between him (the mortgagee) and the mortgagors, binding him to apply the rents and profits to the payment of the debt, he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his *mehta* was in possession. But their Lordships are of opinion that that is not the true construction of the deed,

¹ *Shah Mukhun Lall v. Baboo Kishon Singh*, 12 Moo. I. A., p. 193; s.c., 2 Beng. L. R., (P. C.), 44, *ante* p. 224.

² See *post* section 86.

³ *Juggeewandas v. Ramdas*, 2 Moo. I. A., p. 500.

"but that it is merely a power to satisfy himself, just as an English mortgagee may "by taking possession of the rents and profits of the estate."

And then he proceeded to lay down the English law as above stated. It may fairly be supposed that the law thus laid down would not be applied to all the usufructuary mortgages mentioned in section 58 (*d*), and that in some at any rate it would be held that the mortgagee by failing to take possession as stipulated would forfeit his rights as mortgagee. The rights to take possession may be lost by delay, the time allowed by Article 135 of the Limitation Act being twelve years from the time when the mortgagor's right to possession determines.¹

Note 3. (c) Generally the duty of paying Government revenue lies on the party in possession (see section 65 (*c*)). This *Government revenue* obligation on the part of the mortgagee in possession has been recognised by the Courts. In the absence of a contract to the contrary the obligation does not arise when the property produces no income out of which the payment can be made.² If by reason of the mortgagee's default the mortgagor has to pay the revenue, he is entitled to take credit for it in settling the accounts.³ In order to save his security which might be swept away by a sale of the property free from incumbrances, it would be to the interest of the mortgagee to pay arrears of revenue, although they accrued due before he came into possession, or even to pay assessment due on other lands of the mortgagor. But he is not bound to make such payments. If he omits to do so and the mortgaged property is sold, he has his personal remedy under section 68⁴ and a charge on the excess proceeds under section 73. If the mortgagee makes default in payment of current revenue and the land is put up for sale and bought by him either in his own name or in that of another, the mortgagor does not lose his right of redemption.⁵ The mortgagee is treated as a trustee for the mortgagor, holding the property for him subject only to repayment of the amount due on the mortgage and the expenses properly incurred.⁶ In a similar case, where the land is bought at the revenue sale by a stranger, the mortgagor's remedy can only be a personal one save so far as regards any excess proceeds. For ordinary

1 *Modun Mokun v. Ashad Ally*, I. L. R., 10 Cal., 68.

2 *Lakshmana v. Appadu*, I. L. R., 7 Mad., 111; *Kalappa v. Shivaya*, I. L. R., 20 Bom., 493.

3 *Jaijit v. Gobind*, I. L. R., 6 All., pp. 300, 309, and see section 65 and note.

4 See *Sawaba v. Abaji*, I. L. R., 11 Bom., 472, and note to section 68, ante p. 238.

5 *Lakshmana v. Appadu*, I. L. R., 7 Mad., 111; *Kalappa v. Shivaya*, I. L. R., 20 Bom., 493.

6 Indian Trusts Act, II of 1882, section 90, quoted in note to section 64; *Sidhes v. Rajah Ojoodhyaram*, 10 Moo. I. A., 540.

cases of leasehold property this clause makes no provision; but it seems clear that if the mortgagee is put in possession he is ordinarily liable to pay the rent. If he is further recognised as tenant by the landlord, there can be no doubt about the matter.¹ It should be noted that the qualifying words 'accruing due in respect thereof during such possession' are not applicable to the arrears of rent. Mr. Stokes also points out the omission of 'and' after Government revenue. Sales under the Madras Rent Recovery Act² differ from revenue sales in that the former are made subject to incumbrances, and therefore the mortgagee does not, by allowing the tenure to be sold, lose his security.³ And it may be doubted whether, under these circumstances, he can be entitled to a charge under section 73.

Note 4. (d) In order to prevent the destruction of the security, the mortgagee is entitled to spend money on repairs
Repairs. out of his own pocket and to add the amount to the mortgage-debt (section 72 (b)).⁴ Under this clause he is bound to make necessary repairs out of any balance of profits remaining when interest and the other charges mentioned in the clause have been satisfied. His liability is the same according to English law.⁵ He is not entitled to take credit for his improvements unless they were reasonable, regard being had to the nature of the estate, and have permanently increased the value of the security,⁶ or unless they were executed under circumstances showing acquiescence by the mortgagor.⁷ If the parties agree to dispense with taking an account, the mortgagee cannot claim compensation on account of repairs or improvements, for the cost of which he would otherwise have been entitled to credit.⁸

Note 5. (e) Like the mortgagor in possession (section 66) and the lessee (section 108 (o)), the mortgagee in possession must not commit acts of waste. He has to use the mortgaged property with the care of a prudent owner; but he is not liable, it may be observed, for loss that arises from accidental causes.

¹ *Kanny v. Nistoring*, I. L. R., 10 Cal., 443.

² Act VIII of 1865, Madras.

³ *Rajagopal v. Subbaraya*, I. L. R., 7 Mad., 31; *Subramanya v. Rnjaram*, I. L. R., 8 Mad., 573. As to such sales in Bengal see *Shahabooddeen v. Futteh*, 7 W. R., 260; and for the present law see Bengal Act VIII of 1885, chap. XIV.

⁴ *Shiva Devi v. Jarn*, I. L. R., 15 Mad., 290.

⁵ *Fisher on Mortgages*, 4th ed., p. 867.

⁶ As to which see *ante* note 2 to section 72.

⁷ *Shepard v. Jones*, 21 Ch. D., p. 479; *Prabhakar v. Pandurang*, 12 Bom. H. C.,

86.

⁸ *Lakshman v. Hari Dinkar*, I. L. R., 4 Bom., 584.

In virtue of his right of possession and of his duty to preserve the property, he can maintain an action against a third party who commits a trespass.¹ Where on the expiration of the term of a usufructuary mortgage, the mortgagee sued for the mortgage-money and the defendant claimed to set-off damages for the destruction of certain trees and buildings on the property, it was held that such a set-off was not permissible under the provision of section 111 of the Code of Civil Procedure.² It is however otherwise under this Act.³ In the accounts to be taken in pursuance of a mortgage-decree, the mortgagee should be debited with any loss occasioned by breach of duty under this section. The liability of the mortgagee in possession does not cease on the passing of the decree. And, although the amount to which he is entitled to credit for improvements effected by him is ascertained in the decree, a change in the condition of the property after the decree may entitle the mortgagee to an enhancement of the amount or the mortgagor to a reduction of it.⁴

Note 6. (f) The liberty to insure the property in the absence of a contract to the contrary is given by section 72.⁵

Insurance.

This clause provides for the destination of the insurance-money. Unless the mortgagor directs that it shall be applied in reduction or discharge of the mortgage-debt, it must be applied in reinstating the property. As to insurances effected by the mortgagor before the mortgage, the mortgagee can under section 49 claim that the insurance money be applied in reinstating the property.⁶ If an insurance is effected by the mortgagor after the mortgage, it is clear that in the absence of an assignment or special contract, the mortgagee cannot be entitled to the benefit of the policy.⁷

Note 7. (g) The obligation to keep accounts was imposed in similar terms by the Regulation of 1793. Detailed accounts

Accounts.

full and complete, showing the gross receipts realized by the mortgagee were required.⁸ The mortgagee in possession

1 Akbar Husain v. Abdul, I. L. R., 16 All., 383.

2 Venkateshwara v. Kesava, I. L. R., 2 Mad., 187; Raghu v. Ashraf, I. L. R. 2 All., 252.

3 Shiva Devi v. Jaru, I. L. R., 15 Mad., 290.

4 Ramunni v. Shanker, I. L. R., 10 Mad., 367; Krishna v. Srinivasa, I. L. R., 20 Mad., 124.

5 See ante note 4 to section 72.

6 See ante p 109.

7 Lees v. Whiteley, L. R., 2 Eq., 143: see notes 44 & 45 Vic., c. 41, section 23 (2) and (4).

8 Ram Kissen Sing v. Shah Kundun Lall, W. R., 1864, Civ. R., 177; Shah Mukhun Lall v. Baboo Kishen Singh, 2 Beng. L. R., (P. C.), 44; s.c., 12 Moo. I. A., 157.

is held strictly to account for the rents and profits of the property. He is required, it is said, to be "diligent in realizing the amount which is due "in order that he may restore the estate to the mortgagor," and he may be called on to account for more than he has actually received if it be proved that but for his gross default, mismanagement or fraud, he might have received more. He is not obliged to render accounts at any fixed time, but he is bound to do so whenever the mortgagor, wishing to redeem or thinking the debt satisfied, calls on him for a final adjustment.¹ By reason of failure to keep proper accounts, he may be unable to prove that arrears of interest remain due to him, and it may be charged against him as misconduct disentitling him to costs.² Although the omission to keep proper accounts raises a presumption against the mortgagee *in odium spoliatoris*, the presumption must be reasonably applied and not founded on mere conjecture, still less in disregard of facts which show that the estimate of receipts is incorrect.³

Note 8. (h) The mortgagee in possession by tenants has to account for the rents received by him, having regard to the duty imposed upon him by clauses (a) and (b) to manage the property with the ordinary prudence of an owner and to make his best endeavours to collect the rents. He cannot be called to account for collections to which his mortgagor previously to the mortgage could not have been entitled, *e.g.*, by reason of an intervening lease.⁴ And as provided in section 72 (u), he is entitled to charge for the expenses of management and collection. If he is in personal occupation, he is charged with the net profits actually realized by him in using the land. To ascertain them allowance must be made for moneys expended in obtaining the produce from the land, such as the cost of seed and fair expenses of cultivation.⁵ It has been held in some cases that a mortgagee who, instead of letting the land to ryots and realizing the rent in the ordinary way, cultivates it himself, is not responsible for the whole of the profits arising to him by farming the land, but only for such profits as he would have realized had he let it to a tenant.⁶

An alternative mode of charging the mortgagee in actual occupation is to charge him with an occupation-rent, and that is more suitable in the case of buildings, whether places of residence or trade premises

1 Fisher on Mortgages, 4th ed., pp. 850, 859; and see section 86.

2 *Ib.*, p. 913; Baboo Kullyan v. Baboo Sheo Nundun, 18 W. R., 65.

3 Shah Mukhan Lall v. Baboo Kishen Singh, 2 Beng. L. R., (F. C.), 44; s.c., 12 Moo. I. A., 157.

4 *Ib.*

5 Prabhakar v. Pandurang, 12 Bom. II. C., 88.

6 Rughoonath v. Gredharee, 7 W. R., 244.

It is only when he is actually in possession, or at least by his servant or agent, that occupation-rent is charged.¹ After credit has been given to the mortgagee for payments on account of revenue or repairs executed by him together with interest thereon, the receipts as they come in should be debited against him in reduction of interest and, if any surplus remains, in reduction or discharge of principal.² Any surplus that still remains after discharge of the principal belongs to the mortgagor.³ But he must sue within three years of his re-entry on the mortgaged property, for the mortgagee is not a trustee in respect of surplus collections.⁴

Note 9. (i) From the moment that a due and proper tender or deposit is made, the mortgagee loses his rights as *Tender or deposit.* such, and from that date interest ceases to run (section 84). If notwithstanding such tender or deposit he chooses to make payments on account of revenue or otherwise, he cannot take credit for them. And it may be doubted whether he could recover sums so paid under section 69 or section 70 of the Contract Act. The clause does not provide for his paying interest on the gross receipts, though such interest has been allowed both here and in England.⁵

77. Nothing in section seventy-six, clauses (b), (d), (g) and (h), applies to cases where there is *Receipts in lieu of interest.* a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Commentary.

Where it is arranged that the usufructuary mortgagee shall enjoy the profits instead of interest on his money, i.e., in the first case mentioned in section 58 (d), or where it is arranged that the profits shall be taken as an equivalent for the interest and certain defined portions of the principal, no question of accounts can arise between the parties, and therefore clauses (g) and (h) of section 76 are

1 Shepard & Jones, 21 Ch. D., 475; Fisher on Mortgages, 4th ed., p. 860.

2 Jaijit v. Gobind, 1 L. R., 6 All., 303; see note to section 86.

3 Kakerlapoody v. Vutsavoy, 2 Moo. I. A., 1.

4 Limitation Act, section 2, and article 105.

5 Tagore Lectures, 1875-76, p. 254; Robbins' Law of Mortgages, p. 1211.

inapplicable.¹ The exemption from the duty imposed by clause (d), though reasonable enough in cases where the profits leave no margin after providing for the interest or for interest *plus* portions of the capital, might, under other circumstances, work injustice to the mortgagor. A mortgagee in the position supposed is bound to pay the Government revenue; but according to this section he is exempted from the duty of making necessary repairs, however great may be the surplus profits that come to his hand. As however, it is to his interest to enhance the profits to the greatest extent, it will generally be to his interest also to maintain the property in repair.

Priority.

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Commentary.

This section must be read as a proviso to section 48 according to which the general rule is that transfers of immoveable property, take effect in the order of time.

If the first mortgagee by concealing his mortgage, by means of fraud or misrepresentation,² induces another to lend money on the same security, there can be no doubt that he would be postponed to the later incumbrancer. The legal mortgage, as would be said in England, would give way to the subsequent equitable mortgage.³ The difficulty arises when instead of fraud or misrepresentation, negligence only, more or less gross, can be charged against the prior mortgagee, and it is sought to bring the case within the operation of the principle of estoppel.⁴ In a recent judgment of the Court of Appeal⁵ the authorities were reviewed in detail, and were said to justify the following conclusions:—

“(1) That the Court will postpone the prior legal estate to a subsequent equitable estate:—(a) where the owner of the legal estate has assisted in or connived at the

1 Vencatachellam v. Tirumalla, 2 Mad. H. C., p. 259.

2 As to these terms see Contract Act, sections 17 and 18.

3 Bhurrat v. Gopal, 11 W. R., 286; Fisher on Mortgages, 4th ed., p. 586.

4 See Evidence Act, section 115; Pickard v. Sears, 6 A. & E., 469, is referred to by the Select Committee in their Report of 2nd Feb. 1878, § 34.

5 Northern Counties Fire Insurance Co. v. Whipp, 26 Ch. D., 482.

"fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in enquiry after or keeping title-deeds may be, and in some cases has been, held to be sufficient evidence, when such conduct cannot otherwise be explained; (b) where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate. But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner."

The facts of the case in which this judgment was given were as follows:— One Crabtree, the manager of a company, executed a mortgage of his property to the company, and his title-deeds were handed over to the company and placed in a safe to which the directors, by leaving one of the duplicate keys in his hands, allowed him to have access. Availing himself of this, Crabtree took out the deeds and handing them to the defendant executed another mortgage in his favour. The question was whether the last mortgage or the mortgage of the company should have priority. The Court, though considering that the carelessness of the directors might be called gross, held that, inasmuch as it was clearly not indicative of fraud, the company had not lost its priority. "They (the company) can have had no motive to desire that their deeds should be abstracted and their own title clouded. Their carelessness may be called gross, but in our judgment it was carelessness likely to injure and not to benefit the company, and accordingly has no tendency to convict them of fraud." According to this view it is not mere negligence that can deprive a mortgagee of his priority. His negligence must be such as to amount to evidence of fraudulent intention, such as to "lead the Court to conclude that he is an accomplice in the fraud." 'Gross negligence' is the term that has been used to denote such conduct. As has been already observed,¹ the use of the expression in this sense is open to the objection that conduct showing negligence and therefore absence of design, cannot correctly be accepted as evidence of designed fraud. In a Madras case the Court referring to *Whipp's* case held that the conduct of the mortgagee in leaving the title-deeds with the mortgagor amounted to gross neglect within the meaning of this section, apart from any imputation of fraud.²

¹ *Evans v. Bicknell*, 6 Ves., p. 190; see *Ratcliffe v. Barnard*, L. R., 6 Ch., 652; *Keith v. Burrows*, 1 C. P. D., 722; *Agra Bank v. Barwy*, L. R., 7 H. L., 157; *Shivram v. Saya*, I. L. R., 13 Bom., 229.

² See note to section 3; *Austin's Jurisprudence*, p. 441, &c.

³ *Shan Maun Mull v. Madras Building Co.*, I. L. R., 15 Mad., 268, see *Balmakundus v. Moti*, I. L. R., 18 Bom., 444.

The cases in which it has been sought to postpone a prior mortgagee to a later incumbrancer have generally had to do with the possession of title-deeds. The mere fact of the mortgagee not obtaining the title-deeds in the first instance, or giving them up after he has obtained them, is not in itself sufficient to deprive him of his priority.¹ If he has asked for the deeds and received a reasonable excuse for their non-production, or if he has received some under the reasonable belief that he was receiving all the deeds, he would not suffer.² On the other hand, if he has refrained from making inquiries with a view to escape notice of a prior claim, it has been held that a subsequent mortgagee whom the mortgagor has thus been enabled to mislead, should gain precedence over him.³ Again, when the mortgagee after having possession of the title-deeds has parted with them on some reasonable representation made by the mortgagor, he does not lose his lien as against a subsequent incumbrancer.⁴ In a Madras case a mortgagee, having occasion to give security to one Kundasawmi, handed him his mortgage-deeds. Kundasawmi gave the documents to his brother-in-law, who thereupon sold the mortgaged property to one Mutha, giving him the documents. Mutha being made a party to a suit by the mortgagee, pleaded that he had bought in good faith, believing the mortgage to have been redeemed. It was held that the conduct of the mortgagee was not such as to entitle the purchaser to resist the mortgagee's claim.⁵ On the other hand, if the mortgagee gives up the title-deeds to the mortgagor in order that he may raise money by another mortgage and takes no precautions to notify the existence of the mortgage, (which is the second case contemplated in the judgment of the Court of Appeal above cited,) there can be no doubt that he should be postponed to a second mortgagee.⁶ The rightful holder of deeds, who has entrusted them to another for a limited purpose, cannot as against a person who has lent money upon them without notice of the limitation recover them except upon payment of the whole sum advanced.⁷ Apart from fraud, it has also been held in England, as already stated, that when the mortgagee, either retaining or receiving back the

Possession of title-deeds.

Estoppel.

1 *Somasundara v. Sakkarai*, 4 Mad. H. C., 369.

2 *Manners v. Mow*, 29 Ch. D., p. 725, and cases cited in 26 Ch. D., p. 492.

3 See cases cited in 26 Ch. D., p. 491; *Spencer v. Clarke*, 9 Ch. D., 137; *Lloyd's Banking Co. v. Jones*, 29 Ch., 221.

4 See cases cited in 26 Ch. D., p. 491.

5 *Mutha v. Sami*, I. L. R., 8 Mad., 200.

6 *Madras Hindu Union Bank v. Venkatrangiah*, I. L. R., 12 Mad., 424.

7 *Brooklesby v. Temperance Building Society*, [1895] App. Cas., 173; see *Lloyd's Bank v. Bullock*, [1896] 2 Ch., 192.

title-deeds, has been authorised to deal with them for the purpose of raising money on the property, the mortgagee cannot, as against those who in reliance on the deeds have advanced their money, insist that the mortgagor has exceeded his authority. In such cases, to which section 115 of the Evidence Act would particularly apply, the Courts have postponed the legal to the equitable estate.¹ "A mortgagee need not "go out of his way to give notice of his security upon hearing that the "mortgagor is dealing with the estate."² But if by his declaration, act, or omission, he intentionally causes or permits a third person to believe that the estate is unincumbered and to act on that belief, a case of estoppel arises. Silence on the part of a mortgagee, when directly appealed to for information by a person proposing to make advances on the property, would amount to a direct representation within this principle, as would attestation by the mortgagee of a second instrument of mortgage, it being proved that he knew the effect of the instrument.³ In further illustration, reference may be made to the cases in which the mortgagee, adopting the course which section 99 now prohibits, brings the property to sale in execution of a money-decree. In such cases it is held that he cannot enforce his mortgage against the purchaser unless it can be shown that the latter has taken with notice of the mortgage. The fact that at some time or another the mortgagee has informed the Court of the mortgage is further held not to be evidence of notice to the purchaser.⁴ Nor is it material that the mortgage is registered.⁵ By section 237 of the Civil Procedure Code the judgment-creditor is required to specify as far as possible the judgment-debtor's interest in the property. If he offers it for sale free of incumbrances, when he is aware of the existence of a mortgage, he is estopped from setting up that mortgage, although at the time of the sale the mortgage was not vested in him and as since been transferred to him.⁶ As the mortgagor's

1 *Perry-Herrick v. Attwood*, 2 De G. & J., 21, explained in *Clarke v. Palmer*, 21 Ch. D., 124; *Briggs v. Jones*, L. R., 10 Eq., 92, cited in 26 Ch. D., p. 402; *Dullab Sirkar v. Krishna Kumar*, 3 Beng. L. R., (A. C.), 407.

2 *Fisher on Mortgages*, 4th ed., p. 587; see *Joshi v. Joshi*, I. L. R., 2 Bom., 650; and note to section 131.

3 *Salamat Ali v. Budh Sing*, I. L. R., 1 All., 303; *Fisher on Mortgages*, 4th ed., p. 587.

4 *Tukaram v. Ramachandra*, I. L. R., 1 Bom., 314; *Nursing Narain v. Raghoo-bur*, I. L. R., 10 Cal., 609.

5 *Agarchand v. Rakhma*, I. L. R., 12 Bom., 678; *Ramachandra v. Jairam*, I. L. R., 22 Bom., 686; *Jaganatha v. Gungi*, I. L. R., 15 Mad., 303.

6 *Kasturi v. Venkatachalapathi*, I. L. R., 15 Mad., 412; *Tinnappa v. Murugappa*, I. L. R., 7 Mad., 107; *Ramachandra v. Jairam*, I. L. R., 22 Bom., 686, distinguishing *Dhondo v. Ravji*, I. L. R., 20 Bom., 290.

possession is *prima facie* a friendly possession and not adverse to the mortgagee, so is that of one who derives title from him, e.g., one who has purchased in virtue of a right of pre-emption,¹ but the position of a purchaser at a sale in execution of a decree is different. In the absence of notice of the mortgage, the possession of such purchaser has been held to be adverse to the mortgagee.²

In considering the English cases relating to the conflict between rival incumbrancers, it is material to note the difference between the case of a contest between equities and one between an equitable title and the legal estate. In the former case, while it is clear that an equitable title to land may be complete without giving the notice which is essential in the case of personal property, mere carelessness may incline the balance against the person who is guilty of it, and it is not necessary to prove the gross negligence required by this section. The question then is, whether one party has acted in such a way as to justify him in insisting on his equity as against the other.³ In *Rice v. Rice*⁴ the vendor of land, having an equitable lien for unpaid purchase-money, nevertheless signed a receipt for it and put that receipt into the hands of the purchaser, thus enabling him to say that there was no claim against the property on behalf of the vendor. In *Waldron v. Sloper*⁵ the equitable mortgagee gave up the title-deeds to the mortgagor for a temporary purpose, but instead of regaining possession of them allowed them to remain with him and thus enabled him to create another equitable mortgage. In both these cases the pre-existing title was held to be displaced by the subsequent incumbrancer. On the other hand, where the owner of the pre-existing title, has done nothing to mislead third parties, and has simply bought in the name of another, or left the *indicia* of title with a trustee, he does not lose his priority because the trustee commits a breach of trust and enters into some dealing with regard to the property with some third person.⁶ He is not bound to give notice of his equitable claim in order to perfect his title and therefore "is not prejudiced by the fact that he

1 *Durga Prasad v. Shambhu Nath*, I. L. R., 8 All., 86.

2 *Anundo Moyee v. Dhonendro*, 14 Moo. I. A., 101; s.c., 8 Beng. L. R., 122.

3 *National Provincial Bank v. Jackson*, 33 Ch. D., 1; *Taylor v. Russell*, [1892] App. Cas., 262; *Hopkins v. Hemsworth*, [1897] 2 Ch., 347, where the contest was between equitable mortgagees.

4 2 Drew, 78.

5 1 Drew, 193.

6 *Shropshire Union Company v. The Queen*, L. R., 7 H. L., 496; *In re Vernon*, *Ewens & Co.*, 33 Ch. D., 402; *Union Bank of London v. Kent*, 39 Ch. D., 238; *In re Richards*, 45 Ch. D., 589; see note 2 to section 40.

has withheld such notice.¹ The mere fact of a man's purchasing property in the name of another cannot be imputed to him as negligence, because it enables that other to deal with the property as if it were his own. Such person can defeat the right of the real owner only by a legal conveyance to a *bond fide* purchaser without notice of his right.²

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to secure uncertain amount when maximum is expressed.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C to secure Rs. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co., of the second mortgage. At the date of the second mortgage, the balance due to B & Co., does not exceed Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

Commentary.

This section departs from the rule laid down in the English decisions, under which, given a mortgage to B to secure a present loan and future advances to a certain amount, a second mortgage to C having notice of the first, and then advances made by B under his mortgage, the question would be whether B when he made those advances had notice of the mortgage to C. Not having had such notice he would be enabled to tack his advances as against C, i.e., to add them to the amount of the original loan and give them the same priority over advances subsequent to that loan. On the other hand, if the mortgagor executes a second mortgage and the first mortgagee knowing of it makes further advances, he does

English law.

1 See *Govindrav v. Ravji*, I. L. R., 12 Bom., 32, and note to section 48, and note to section 131 *ad fin.*

2 See *Govindrav v. Ravji*, I. L. R., 12 Bom., 33, and section 41 and note.

so with the knowledge that as to those advances he will have to rank after the second mortgagee.¹

By the section, so far as those cases are concerned where immoveable property is mortgaged to secure an expressed maximum advance, &c., there is substituted for the above rule one according to which the fact, that the first mortgagee when he makes his further advances has notice of the second mortgage, is immaterial. Although he may have had such notice, the second mortgagee having had notice of the prior mortgage is postponed. The question of priority depends not, as in the English cases, on the notice received by the first mortgagee claiming to tack his subsequent advances, but on the notice received by the person *against* whom it is sought to tack such advances. The provision that a maximum is to be expressed in the first mortgage and that the advances are not to exceed that maximum, does not in any way reconcile the section with English law. In *Hopkinson v. Rolt* it appears that the maximum was expressed and the amount claimed did not exceed it. According to the English rule the first mortgagee, being under no obligation to make further advances and knowing that notice of a second mortgage would, as to subsequent advances, reduce him to the rank of a puisne incumbrancer, might, unless the security were ample, refuse to make such advances. Having an option to make advances or not, he could not be prejudiced. While on the other hand, if notwithstanding notice of the second mortgage the first mortgagee could still claim priority for his further advances, the result might be that the mortgagor would never be able to borrow at all.² For instance, in the ordinary case of a planter mortgaging his estate to a bank as security for advances to be made from time to time for the upkeep of the estate, no other bank having notice of this mortgage and knowing that the first bank might make further advances which would rank in priority to advances made on the security of a second mortgage, would venture to lend money on that security. And so in effect the planter would be compelled to resort to the first bank only, which bank however could not be compelled to meet his demands for money. This objection to the rule introduced by the section would be lessened if it were restricted to the case where in the first mortgage there is a covenant on the mortgagee's part to

1 *Hopkinson v. Rolt*, 9 H. L. C., 514; see also *Bradford Banking Co. v. Briggs*, 29 Ch. D., 149; 31 Ch. D., 19; judgment of Field, J., restored in 12 App. Cas., 29, and see *Union Bank of Scotland v. National Bank of Scotland*, *ib.*, 53; *Fisher on Mortgages*, 4th ed., p. 570.

2 See *per* Field, J., 29 Ch. D., p. 153. The rule in *Hopkinson v. Rolt* does not apply when further advances have been made in pursuance of a covenant to that effect, *West v. Williams*, [1898] 1 Ch., 488.

make further advances up to a certain amount. No such limitation however is contained in the section. To transactions relating to moveable property it is apprehended that the English rule will still apply.

As between mortgagor and mortgagee a condition postponing redemption until the payment off of prior debts or future advances is enforceable against the mortgagor. Such a condition may be valid in respect of prior debts although no charge is created with regard to them.¹ In a case where the question arose as between the purchaser of the equity of redemption and the mortgagee who had made further advances to the mortgagor subsequently to the purchase, it was held that, although the purchaser was not bound to give notice of his purchase to the mortgagee, the conduct of the purchaser, in allowing the property to stand in the mortgagor's name in the Collector's book, and thus inducing the belief that he still remained owner of the equity of redemption, would give the mortgagee a better equity and entitle him to hold the property as security for his further advances.²

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section seventy-nine, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Commentary.

The doctrine of tacking as obtaining in England arose from the notion that the first incumbrancer, having the legal estate and an additional claim in equity, should not be defeated by one possessed of an equitable estate only. It was thought that equity should not compel him to part with the estate until all his claims on it were satisfied. This right of the legal mortgagee avails both against the mortgagor and against subsequent incumbrancers. Whether the case be one where the legal mortgagee, not having notice of a second incumbrance, has made further advances on the same security, or one where a third or later mortgagee has, without notice of the

¹ Hari Mahadaji v. Balambhat, I. L. R., 9 Bom., pp. 233, 236; Allu Khan v. Roshan, I. L. R., 4 All. 85; see *ante* p. 207, and note to next section.

² Govindrav v. Ravji, I. L. R., 12 Bom., 33.

second or other intermediate mortgage, purchased the first mortgage; in either case the holder of the legal estate can "squeeze out and have" satisfaction before the second "incumbrancer. It matters not that when he bought the legal estate he had notice of the second incumbrance over which he might desire to claim priority for his later incumbrance.¹ The effect of this and the preceding section is to declare that the doctrine of tacking shall no longer avail to the prejudice of subsequent incumbrancers except under the 'circumstances stated in section 79.² In so far as the doctrine would enable the purchaser of the legal estate to 'squeeze out' a second incumbrancer in the manner above indicated, it does not appear to have been recognised in this country, and for the most part it has been distinctly repudiated.³ In a case where the contest

Cases where tacking is admissible.

was between the second mortgagee on the one hand who had obtained a decree for sale and the defendants on the other hand, who had received the proceeds of the property sold in execution of a decree passed on the first mortgage and a third mortgage, it was contended that, as the property had been sold in discharge of these two incumbrances, the defendants were under clause (c), section 295 of the Civil Procedure Code, entitled to the proceeds in priority to the second mortgagee; but it was held that such a method of distribution, postponing the second mortgagee to the third, would not be consistent either with that section of the Code or with the present section.⁴ The doctrine of tacking has however been recognised and may still be applied as between mortgagor and mortgagee, as where a mortgagor subsequently to the mortgage gave his mortgagee bonds in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage and that redemption should not be claimed until it was satisfied. It has been held in such cases that, though the subsequent bonds may not create a further charge, they would prevent the mortgagor from redeeming without paying their amounts.⁵ Similarly the charges

1 *Marsh v. Lee*, 1 W. & T. L. C., 6th ed., p. 696; *Jennings v. Jordan*, 6 App. Cas., 698; see *per Fry, J.*, *Harter v. Coleman*, 19 Ch. D., p. 630; *Robinson v. Trevor*, 12 Q. B. D., 423, discussed in *Sangster v. Cochrane*, 22 Ch. D., 298.

2 *Unni v. Nagammal*, I. L. R., 18 Mad., 368.

3 *Narayan Venkoba v. Pandurang*, I. L. R., 7 Bom., 526; *Gaur Narayan v. Brajanath*, 5 Beng. L. R., 463; *Udaya Chandra v. Bhajahari*, 2 Beng. L. R., Appx., 45; *Golaknath Misser v. Lalla Prem Lal*, I. L. R., 3 Cal., 307; *Sirbadh Rai v. Baghnath*, I. L. R., 7 All., p. 573.

4 *Mithu Lal v. Kishan*, I. L. R., 12 All., 546.

5 *Hari Mahadaji v. Balambhat*, I. L. R., 9 Bom., 233; *Rama v. Martand*, *ib.*, 236; *Yashwant v. Vithoba*, I. L. R., 12 Bom., 231; *Govindro v. Kumud*, I. L. R., 25 Cal., 618; *Allu Khan v. Roshan*, I. L. R., 4 All., 85, commented on in *Unni v. Nagammal*, I. L. R., 18 Mad., 371, 373.

incurred under the provisions of section 72 may be added to the principal money.¹

There is another case of tacking for which the Act makes no provision. *As against the heir of the mortgagor or other person becoming liable to his debts by reason of possession of his property, the mortgagee is allowed to tack an unsecured debt. This is not founded on any principle of equity, but is allowed merely to avoid circuity of action, in "order that the creditor may not be driven to enforce by separate proceedings claims to which the operation of law or the act of the mortgagor have rendered the same person liable."² Such tacking is not permitted to be done to the prejudice of mesne incumbrancers or other secured creditors. The principle was applied by the Bombay High Court in a case where the plaintiff claimed to redeem as the donee of the mortgagor's entire estate. There being no other creditor of the mortgagor, the plaintiff was only allowed to redeem on the terms of paying an unsecured debt due by the mortgagor as well as the debt secured by the mortgage.³

Marshalling and Contribution.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has no notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Commentary.

In order that the doctrine of marshalling should apply, there must be two estates both belonging to the same person and two creditors to one of whom both estates are, and to the other of whom, ignorant of

1 Compare *Nugenderchunder v. Sreemutty*, 11 Moo. I. A., p. 259.

2 Fisher on Mortgages, 4th ed., p. 572.

3 *Ragho v. Balvant*, I. L. R., 7 Bom., 101, following *Rolfe v. Chester*, 20 Beav.,

the first mortgage, one of the estates is mortgaged. According to the general rule the first creditor, having two securities, might enforce his claim against both or either of them as he might think fit. But, if by making one of the estates exclusively liable, he would defeat the second creditor who has no security except that estate to which to resort, equity intervenes to restrain the first creditor from resorting to the latter security, until the other which he alone possesses is exhausted. The principle in such cases is that "it shall not depend upon the will of one creditor to disappoint another."¹

"It comes to this," said Cotton, L.J., in a recent case,² "that if A has a charge on Whiteacre and Blackacre, and if B also has a charge on Blackacre only, A must take payment of his charge out of Whiteacre only and must leave Blackacre, so that B, the other creditor, may follow it and obtain payment of his debt, out of it: in other words, if two estates, Whiteacre and Blackacre, are mortgaged to one person, and subsequently one of them, Blackacre, is mortgaged to another person, unless Blackacre is sufficient to pay both charges the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave to the second mortgagee Blackacre, upon which he alone can go."

The parties between whom marshalling is enforced must both be creditors of the same person and have demands against the property of the same person.³ In a recent case the facts were as follows:—The first defendant acting on behalf of his undivided family mortgaged certain property to the plaintiff. Of this property part fell, on a partition of the family estate, to the share of the first defendant and part to that of the second; afterwards the first defendant hypothecated part of his share with the third defendant who subsequently brought a suit and bought that part under his decree. A suit was then brought by the plaintiff on his mortgage and in the decree a direction was inserted that the plaintiff should proceed first against the property which was not included in third defendant's mortgage, the effect of which direction would have been to make the second defendant's share primarily responsible for the plaintiff's claim. It was held on appeal that this direction was wrong, because, while the plaintiff was creditor of the joint family, having a claim against the whole property included in his mortgage, the third defendant was a creditor of the first defendant only, and to him the property, against which the third defendant insisted that the plaintiff should first proceed, did not belong. There was no

¹ Aldrich v. Cooper, 2 W. & T. L. C., 6th ed., p. 82.

² Webb v. Smith, 30 Ch. D., p. 200; and see Tidd v. Lister, 10 Hare, 140; Gibson v. Seagrinn, 20 Beav., 614.

³ Ex parte Kendall, 17 Ves., 520; See Aldrich v. Cooper, 2 W. & T. L. C., 6th ed., p. 82.

case for marshalling in favour of the third defendant, nor had the first defendant any equity to insist that the plaintiff should first proceed against the property which had fallen to the second defendant's share in order to save his own.¹ It is no objection to the application of the rule that the property left as a primary security for the first mortgagee is or is likely to be the subject of a claim by a third party.²

The doctrine of marshalling cannot be applied where the creditor having the single security is himself bound to the party entitled to the other security. Thus, where an owner of property made a voluntary settlement of it and subsequently executed mortgages which under the statute of Elizabeth defeated the settlement, and finally had a judgment recovered against him, it was held that the judgment-creditor, having only the life-interest of his debtor under the settlement to look to, could not compel the mortgagees, who had the whole estate as their security, to seek their payment out of the reversion only. As against the judgment-creditor the prior voluntary settlement was good, and he could claim no larger rights against the property than his debtor. To allow the judgment-creditor to throw the mortgages on the reversion only would have been an application of the doctrine of marshalling in prejudice of third parties, namely, the persons taking under the settlement, and, as was observed, the Court "will not interfere actively against a volunteer through the medium of a person claiming only through him who created the voluntary settlement."³

The doctrine in question has been acted upon by the Courts in this country. Thus where the owner of a mouzah hypothecated it to Government and then mortgaged it with other property to the plaintiff, it was held that a purchaser of the mouzah from Government was entitled to require that the other property should first be applied in satisfaction of the plaintiff's mortgage.⁴ It has been held that the doctrine is inapplicable where the contest is one between a mortgagee and an execution-creditor holding a mere money-decree. Such a creditor cannot claim to have the mortgagee deprived of his ordinary right.⁵ The application of the rule of marshalling in favour of the *bona fide* purchaser for value of part of the incumbered property is open to some doubt. According to

*Cases before the
Act.*

1 Gopala v. Saminathayya, I. L. R., 12 Mad., 255.

2 Inderdewan v. Gobind, I. L. R., 23 Cal., 790.

3 Dolphin v. Aylward, L. R., 4 H. L., 486, 502.

4 Toolsee Ram v. Munnoo Lal, 1 W. R., 353; see also Bishonath v. Kisto Mohnn, 7 W. R., 483.

5 Kristodass v. Ramkant, I. L. R., 6 Cal., 142; see however Mussamut Nowa Koowar v. Abdool Ruheem, W. R., 1864, p. 374.

the opinion of Mahmood, J., the equities which apply to a puisne incumbrancer in the marshalling of securities apply equally to such a purchaser.¹ But other judges have held that, where the owner of property first mortgaged it to A and then sold part of it to B, A could not be compelled to resort first to that part of property which had not been sold.² And this opinion has recently been followed in Bombay.³ At the same time in such a case as this, the purchaser B would as against the seller be entitled to have the mortgage satisfied out of the portion remaining in the seller's hand so far as it would extend: see section 56.⁴ Whether these decisions are correct or not the present section is inapplicable to such cases as those then under consideration.⁵ In Bombay cases decided independently of the Act it has been held in accordance with the rule of English equity that notice of the prior mortgage does not affect the puisne mortgagee's right to have the securities marshalled.⁶

In cases to which the Act applies it is only the mortgagee who takes without notice of the prior mortgage that can take advantage of the rule. Notice obtained subsequently is immaterial.⁷ Further, the claim to marshal must not be suffered to prejudice the rights of the first mortgagee or of others who are purchasers for value. For instance, if two estates, X and Y, belonging to the same person are first mortgaged to B, then X is mortgaged to C and thirdly Y to D, C would not be permitted to compel B to marshal in his favour, for that course would prejudice D.⁸ Similarly D could not compel B to resort in the first instance to the estate X. The case would be one for contribution under the first paragraph of the next section. As between C and D, B is bound to satisfy himself out of the two estates ratably and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon.⁹

- Limitations of doctrine*
- 1 *Rodh Mal v. Ram Harakh*, I. L. R., 7 All., 711.
 - 2 *Lala Dilawar v. Dewan Bolakiram*, I. L. R., 11 Cal., 258; *Banwari Das v. Muhammad*, I. L. R., 9 All., 690; *Indukuri v. Yerramilli*, I. L. R., 5 Mad., 387; *Bhikhari v. Dalip Singh*, I. L. R., 17 All., 434.
 - 3 *Lakhmidas v. Jamnadas*, I. L. R., 22 Bom., 304.
 - 4 See *ante* p. 169.
 - 5 *Bhikhari v. Dalip Singh*, I. L. R., 17 All., 434.
 - 6 *Chunilal v. Fulchand*, I. L. R., 18 Bom., 166; *Lakhmidas v. Jamnadas*, I. L. R., 22 Bom., 304.
 - 7 *Inderdawan v. Gobind*, I. L. R., 23 Cal., 790, in which also it was held that registration is not notice, as to which see note 3 to section 3.
 - 8 *Fisher on Mortgages*, 4th ed., pp. 664, 665.
 - 9 *Gibson v. Seagrim*, 20 Beav., p. 619; *Flint v. Howard*, [1893] 2 Ch., p. 72.

But if the third mortgagee takes as his security only the surplus remaining over after the two prior mortgages are paid off, marshalling will take place as between them without regard to his interests.¹

82. Where several properties, whether of one or [1]
Contribution to mortgage-debt. several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable [2] under section eighty-one to the claim of the second mortgagee.

Commentary.

As the doctrine of marshalling works in the interest of incumbrancers, so that of contribution enunciated in this section and section 95 works to the advantage of the owners of, and other persons interested in incumbered estates. "These rights act reciprocally, and rest upon the principle that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone; and, on the other hand, that a creditor who has the means of satisfying his debts out of several funds shall so exercise his right as not to take from another creditor or claimant the fund which forms his only security."²

Note 1. The two paragraphs are so far similar that they both include the case of one of two properties, X and Y, first mortgaged to B

1 *In re Mower's Trusts*, L. R., 8 Eq., 110.

2 *Fisher on Mortgages*, 4th ed., p. 659; cited in *Hari Raj v. Ahmad-ud-din*, L. L. R., 19 All., 545.

and then both mortgaged by the same person to 'C. In both paragraphs it is provided that the properties charged with the later debt are to contribute to it rateably. In order to estimate the value of the properties for the purpose of this contribution, the first paragraph declares that the amount of the prior incumbrance, as it stood at the date of the later mortgage, shall be deducted from the value of the incumbered property. On the other hand, in the second paragraph it is supposed that the debt charged on the one property is paid out of that property, and then it is provided that in valuing that property the amount so paid shall be deducted. If it is meant that part of the property may be sold to pay the first debt, or that the property, being in the shape of a fund, may be in part devoted to the debt, it is obvious that only the residue of the property or fund is available to contribute to the other debt, charged upon it and on the other property.

When it is said that the several properties are liable to contribute rateably, it is not meant that the purchasers of different parts of the mortgaged property are entitled to compel the mortgagee to apportion his claim as against the several parts. The whole property remains liable for the entire debt and it is only as between the purchasers that contribution is enforceable.¹ It does not follow that the purchaser of a part of the mortgaged property can insist that the mortgagee shall proceed first against the other part remaining in the hands of the 'mortgagor,' or that he can redeem the part so purchased on paying a part of the debt.² But as between the mortgagor and the purchaser the latter is entitled under section 56 to have the mortgage satisfied as far as possible out of the unsold property.

The rule laid down in *Fisher on Mortgages*, which is reproduced almost word for word in the first paragraph, can only come into force when the mortgaged properties, on the death of the mortgagor, fall into the hands of different persons. Thus, where one of two mortgaged estates has been devised to one person and the other to another, or where, realty and personalty being comprised in one mortgage, matters have to be adjusted between the heir and the administrator, the amount of the mortgage has to be apportioned rateably on the two estates, the amount of any prior incumbrance on either estate being deducted in arriving at the value of such estate.⁴ Another case in which the

1 *Roghunath v. Harlal*, I. L. R., 18 Cal., 320; *Chagandas v. Gansing*, I. L. R., 20 Bom., 615.

2 *Laza Dilawar v. Dewan Folakiram*, I. L. R., 11 Cal., 259; *Beni Prosad v. Rewat Lal*, I. L. R., 24 Cal., 706, but see other cases cited in note to section 81.

3 *Kuppusawmy v. Papatih*, I. L. R., 21 Mad., 369.

4 *Lipscomb v. Lipscomb*, L. R., 7 Eq., 501; *De Rochefort v. Davis*, L. R., 12 Eq., 540.

principle is applied is that in which marshalling would prejudice a prior or subsequent incumbrancer. (See last paragraph of note to section 81.)

It is only in the absence of a contract to the contrary that the principle applies. It has to be seen whether there is anything in the terms of the deeds or in the nature of the transaction to show that the debt was intended to be thrown on one of the two properties to the exoneration of the other. If it appears that one was intended to be a primary security and the other secondary or auxiliary, it must follow that the former must bear the whole burden of the debt so far as it will go before the other is resorted to.¹

The right to contribution as between the owners of mortgaged property may be enforced by suit in which all the contributories may be joined.² The suit is one in which the property itself may be made liable, and therefore a purchaser who takes it *pendente lite* holds subject to a charge in the plaintiff's favour.³ Each party has to contribute in proportion to the value which his property bears to the whole comprised in the mortgage, and it is clear that one, having paid off the debt, cannot claim the whole sum so paid from the other mortgagors collectively.⁴ If the mortgagee has bought the equity of redemption in part of the mortgaged property, it is not competent to him to execute his decree by sale of the rest of the property, reserving the part which he has himself purchased.⁵ Where twelve properties were mortgaged and afterwards one of them was sold in execution of a decree against the mortgagor, it was held that the mortgagee who had himself obtained a decree on his mortgage was not at liberty to proceed against this one property which had passed out of the mortgagor's possession, but that his claim should be apportioned between the twelve properties, and that the mortgagee should be restrained from taking out execution against the property which had been sold without showing the Court that he had made every effort to satisfy his decree against the other properties.⁶ The Bombay High Court followed this decision in a case where the plaintiff had taken a

1 *In re Athill*, 16 Ch. D., 211; *In re Dunlop*, 21 Ch. D., 583.

2 *Ibu Husain v. Ramdai*, I. L. R., 12 All., 110.

3 *Baldeo v. Baij Nath*, I. L. R., 13 All., 371.

4 *Hira Chand v. Abdal*, I. L. R., 1 All., 455; *Bhairab v. Nadyar*, 3 Beng. L. R., A. O., 357; *Jeetram v. Doorga*, 22 W. R., 430.

5 *Kishon Pertab v. Lalla Nund*, 25 W. R., 388.

6 *Ramdhun v. Mohesh*, I. L. R., 9 Cal., 406; see *Bhagirath v. Naubat*, I. L. R., 2 All., 115; *Jagat Narain v. Qutub*, *ib.*, 808, followed in *Chagundas v. Gansing*, I. L. R., 20 Bom., 615.

mortgage of certain lands from two brothers, S and Y, in January 1878, and in July 1878 took a second mortgage of part of the same lands from S, while the defendant in 1882 had taken a mortgage of other parts of the same lands. Before the mortgage to the defendant, plaintiff had sued upon his second mortgage and himself purchased the mortgaged property. He then brought a suit upon his first mortgage and sought to make the lands, comprised in the defendant's mortgage, exclusively liable in respect of it. It was held that, as all the parties interested were present, there was no reason why effect should not be given to the defendant's right of contribution. The debt was accordingly apportioned between the property purchased by the plaintiff and the property in the defendant's hands.¹ Again, where the plaintiff having acquired by purchase the mortgagor's interest in one of several estates, the subject-matter of two successive mortgages to B, afterwards purchased through a trustee the interest of B in both mortgages, it was held that he could not foreclose the first mortgage, in order to satisfy the debt due thereunder, and then sue the mortgagor personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all and he himself were not liable for his proportion of it. It was ruled therefore that the debts should be paid by plaintiff and defendant, in the proportion of the aggregate value of the estates mortgaged to the value of that purchased by the plaintiff, and that the defendant should be at liberty to redeem all the estates except that one, upon repaying a proportion of the debt corresponding with the proportionate value of the other estates to that estate.²

Note 2. By the proviso it is in effect declared that, where marshalling and contribution might conflict with each other, marshalling is to prevail. This conflict could occur in the following case. The owner of two properties, X and Y, after mortgaging them separately to B and C, mortgages them together to D and then mortgages X to E. Here E is under section 81 entitled to compel D to resort to property Y and satisfy his claim out of that security as far as it will go. On the other hand, according to the first clause of section 82, the two properties, X and Y, are declared liable to contribute to the debt secured by them rateably, and it might conceivably be to the advantage of a person interested in the equity of redemption to have the debt so apportioned, with the result of

1 *Moro Raghunath v. Balaji*, I. L. R., 13 Bom., 45, distinguishing *Gaya Prasad v. Salik*, I. L. R., 3 All., 682; *Lakshmidas v. Jamnadas*, I. L. R., 22 Bom., 304.

2 *Kali Prosonno v. Kanuni*, I. L. R., 4 Cal., 475.

diminishing E's security. The proviso prevents this section being used to the prejudice of a subsequent mortgagee in the position of E,

Deposit in Court.

At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Power to deposit
in Court money due
on mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of complaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Right to money
deposited by mort-
gagor.

Commentary.

Instead of making a tender, the mortgagor or any other person entitled under section 91 to institute a suit for redemption may avoid the uncertainties of that course by making a deposit in Court under this section.¹ The provision is borrowed from the Bengal Regulations I of 1798 and XVII of 1806 under which the mortgagor was enabled by making a tender or deposit in Court within the year of grace to prevent foreclosure. The year of grace, it should be noted, was the period mentioned in the notification issued to the mortgagor by the Court, within which he was required to redeem the property, or, in default, have the mortgage foreclosed and the conditional sale made absolute. Under this section the deposit may be made at any time after a suit for redemption has become maintainable

Effects of a deposit.

¹ See as to English practice, *Bank of New South Wales v. O'Connor*, 14 App. Cas., p. 283.

and before it is barred. As under the Regulation, so under this section, the tender or deposit must be full and unconditional.¹ The amount due will include interest if the mortgagee stipulated for interest, but it will not include mesne profits to which the mortgagee may be entitled owing to his having been wrongfully kept out of possession by the mortgagor.² There must be an actual deposit of the interest as well as the principal, and the fact that a decree has been obtained for the interest does not excuse the omission to include interest in the deposit.³

The latter part of the section provides for the manner in which the mortgagee can make good his right to the money deposited by the mortgagor. When the deposit has been made and notice thereof has been received by the mortgagee, he cannot institute a suit for foreclosure or sale,⁴ and from that date, or at any rate after he has had an opportunity of so making good his right to the sum deposited, he loses under section 84 his claim to any fresh interest on the principal money,⁵ and further becomes liable to account for his gross receipts from the mortgaged property, notwithstanding the provisions in the first eight clauses of section 76.⁶ The right, which the mortgagee has to add to the mortgage-money the sums paid by him on account of revenue, ceases on his drawing out the money paid into Court and depositing in Court the mortgage-deed. Having relinquished his lien he can no longer enforce payment of such sums by a suit for sale of the land.⁷ Sections 102 and 103 provide for the service of notice in cases of the absence or incompetence of the mortgagee.⁸

It has been held that the order passed on a petition presented under this section is not in the nature of a decree in a suit, and that, section 375 of the Civil Procedure Code not being applicable, a suit to enforce a compromise will lie, notwithstanding the dismissal of such petition.⁹

It is to be noted that the section does not require the mortgagee, accepting the deposit in full discharge of his claim, to do more than deliver up the mortgage-deed. He may still refuse to deliver up

¹ *Nann v. Manchu*, I. L. R., 14 Mad., 49; see note to section 84.

² See *Rameshar v. Kanhia*, I. L. R., 3 All., 653, a case decided under the Regulation followed in *Allah Baksh v. Sada*, I. L. R., 8 All., 185.

³ *Havanohal v. Jawahir*, I. L. R., 16 Cal., 307.

⁴ *Sitaramayya v. Venkataramanna*, I. L. R., 11 Mad., 371, and see the first paragraph of section 67.

⁵ Subject to the provisions in the second paragraph of that section.

⁶ See section 76 (i).

⁷ *Anandi v. Dur Najaf*, I. L. R., 13 All., 195.

⁸ *Tatayya v. Pichayya*, I. L. R., 13 Mad., 316.

possession of the property and to re-transfer the property to the mortgagor or to execute in his favour the registered acknowledgment mentioned in section 60. It may therefore be necessary for the person making the deposit to bring a suit for possession under section 62, although the deposit has been accepted. (See Rule 11, Appendix II.)

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Commentary.

In order that it should be valid and effective, the tender or deposit must be adequate and unconditional, and in other respects conformable to the ordinary rules relating to tender.¹ A mere offer by letter to pay is not a tender.² As to the coin in which the tender must be made, see the Indian Coinage Act XXIII of 1870, sections 12, 13 and 14. Where, however, the loan was expressed to be made in the Poona currency, it was held that the mortgagee was entitled to payment in that currency and not according to British currency.³ A tender of part only of what is due is of no effect; unless, perhaps, it is made by the debtor in the belief that he is discharging the whole debt in which case the tender may be good *pro tanto*.⁴ It was held in cases arising under the Regulation that the deposit, though insufficient, should be received by the Court and notified to the mortgagee, but unless the latter chose to accept

¹ See Contract Act, section 38.

² *Kamaya v. Devapa*, I. L. R., 22 Bom., 443.

³ *Trimbak v. Sakharani*, I. L. R., 16 Bom., 599.

⁴ *Haji Abdul v. Haji Noor Mahomed*, I. L. R., 16 Bom., 141.

it in full satisfaction of his claim, it could avail the mortgagor nothing.¹ A deposit coupled with a request that the money should not be paid over to the mortgagee would be invalid under this and the preceding section as it was under the Regulation;² as also would be a deposit accompanied by a denial of the mortgagee's title and notice that a suit would be brought to recover back the money.³ At the same time a tender made under protest is valid, inasmuch as it imposes no condition on the creditor, and merely serves to prevent the payment from operating as an admission of the justice of the demand,⁴ and the opinion has been expressed that a tender is not vitiated by a request for the return of the title-deeds.⁵ If the mortgagor has, in order to satisfy the mortgagee's demand and without admitting that the whole sum is due, paid into Court more than is really due, the mortgagor can recover the excess from the mortgagee on his taking the whole sum out of Court.⁶ According to the Contract Act tender to one of several joint promisees is a valid tender to all (section 38), and that is the common law rule; but in equity it has been held that the receipt of one mortgagee does not discharge the debtor from claims by the others.⁷

Tender may be waived expressly or by conduct on the creditor's part, indicating his determination not to accept the amount due. It is not enough that the creditor makes an excessive demand, but if he refuses to listen to any proposition to take less and, as it were, announces that it is useless to offer any smaller sum, that amounts to dispensation with tender; even if the debtor on his part has resolved not to tender the amount really due.⁸

On a valid tender or deposit being made, interest ceases to run on the mortgage-debt,⁹ unless there is a contract for 'reasonable notice' valid under section 60, in which case the interest will presumably cease on the

Cessation of interest.

1 *Dabee Rawoot v. Heeramun*, 8 W. R., 223.

2 *Goluckinonee v. Nabungo*, W. R., (F. B.), 14.

3 *Prannath Chowdry v. Rookan*, 7 Moo. L. A., 323; *Abdoor Ruhman v. Kisto Lall*, Beng. L. R., Sup. Vol., 598; s.c., 6 W. R., 225; *Makhan Knar v. Jasoda*, I. L. R., 6 All., 399.

4 *Scott v. Uxbridge Railway Company*, L. R., 1 O. P., 596; *Greenwood v. Sutcliffe*, [1891] 1 Ch., 1.

5 *Kora Nayar v. Ramappa*, I. L. R., 17 Mad., 267.

6 *Macpherson on Mortgages*, 7th ed., p. 524, citing *Baboo Juggutputtee v. Madho Singh*, S. D. A., (1855), 54.

7 *Barber v. Ramanna*, I. L. R., 26 Mad., 461, and cases there cited.

8 *The Norway, Brown. & Lush.*, 226, and (in P. C.), 409; *Kerford v. Mondel*, 28 L. J., Ex., 303.

9 *Deo Dat v. Ram Autar*, I. L. R., 8 All., 502. The other effects of the deposit are treated in the note to section 83.

expiry of the notice.¹ If by reason of the mortgagee's refusal to accept the amount the mortgagor is compelled to sue for redemption, he will be entitled to his costs.² A mortgagee rejecting a tender does so at his peril; but no action lies for refusal to accept a valid tender, nor is the mere tender equivalent to payment so as to entitle the mortgagor to recover the title-deeds. His only remedy is by suit for redemption.³ According to the English practice, six months' notice is required to be given by the mortgagor of his intention to pay off the mortgage-money, and the money must be paid on the very day on which the six months expire, or interest does not cease to run. The notice is however dispensed with if the mortgagee has demanded payment or if the mortgagor is willing to pay six months' interest in advance.⁴ And the rule does not apply in the case of mortgages by deposit of title-deeds.⁵

Suits for Foreclosure, Sale or Redemption.

85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

Parties to suits
for foreclosure, sale
and redemption.

Commentary.

As well here as in England the general rule has obtained that all persons interested in the property must be joined as parties to any suit on the mortgage, and that a decree made behind the back of such persons cannot bind them. The reason for the rule is plain. When, in order to adjudicate on a given claim, the interest of some third person has to be determined, that person should be made a party, for otherwise another suit may be necessary. Multiplicity of suits can only be avoided by bringing on the record all those parties who have an interest in the determination of the plaintiff's claim. Thus, as the second and subsequent mortgagees are interested in the mortgagor's right of redemption and in the account which has to be taken between him and the first mortgagee, it is clear that the latter suing for foreclosure or sale must

¹ See section 60, note 3.

² See note to section 86.

³ Bank of New South Wales v. O'Connor, 14 App. Cas., 273.

⁴ Robbins on Mortgages, 708.

⁵ Fitzgerald's Trustee v. Mellersh, [1892] 1 Ch., 385; see note 3 to section 60.

in all subsequent incumbrancers. On the other hand, the questions that arise between a mortgagee and his sub-mortgagee do not concern the mortgagor. In suits between them therefore it is not necessary according to English practice to join the mortgagor.¹ Here however the rule as to parties is enacted as a universal one, and no allowance is made for the exceptions admitted in England. It is clear that derivative mortgagees must be made parties in suits of either kind and the sub-mortgagee himself may sue the mortgagor for sale.² A suit by a puisne mortgagee in which he, knowing of a prior incumbrance, omits to join the holder of it, ought to be dismissed,³ and it has even been held that the suit should be dismissed by a Court of appeal although the objection was not taken in the Court of first instance.⁴ If the suit is not dismissed, the parties who are interested should be joined.⁵ If, without joining the first incumbrancer, the later mortgagee obtains a decree for sale, he will on the objection of the former be prevented from bringing the property to sale. For the purposes of the section it has been held that a second mortgagee has constructive notice of a prior mortgage which is registered.⁶

In a redemption-suit where there are several persons jointly entitled to redeem, they are all necessary parties.⁷ It is not necessary that they should all join as plaintiffs, but if not so joined they must be joined as defendants provided of course that they can be ascertained. If there is a person interested, *e.g.*, as heir, who cannot be ascertained, the Court does not refuse a decree for redemption, but makes it subject to the rights of the person so interested.⁸ Further, the mortgagor must join as defendants, in addition to the first mortgagee, any subsequent incumbrancers and

- Parties in redemption-suit.*
- 1 Robbins on Mortgages, pp. 1008, 1014.
 - 2 Muthu Vijaya Raghunada v. Venkatachalam, I. L. R., 20 Mad., 35.
 - 3 Mata Din v. Kazim, I. L. R., 13 All., 432; Salig Ram v. Hur Charain, I. L. R., 12 All., 548, distinguished in Kali Charan v. Ahmed Shah, I. L. R., 17 All., 48; Balmakund v. Sangari, I. L. R., 19 All., 384; Sundar Singh v. Bholu, I. L. R., 20 All., 322.
 - 4 Ghulam Kadir v. Mustakim, I. L. R., 18 All., 109.
 - 5 Jamna v. Ganga Pershad, I. L. R., 19 Cal., p. 411.
 - 6 Janki v. Kishen, I. L. R., 16 All., 478; Jugul Kissore Lal v. Cartio Ohunder, I. L. R., 21 Cal., 116.
 - 7 Ram Baksh v. Mohunt, 21 W. R., 428; Gan Savant v. Narayan, I. L. R., 7 Bom., p. 472; Trimbak v. Sakharam, I. L. R., 16 Bom., p. 602; Bolton v. Salmon, (1891) 2 Ch., 48; Ragho v. Sheikh Faud, I. L. R., 13 Bom., 51; see section 60, note 4.
 - 8 Hall v. Heward, 32 Ch. D., 430; for form of decree see Pearce v. Morris, I. L. R., 5 Ch., 227.

derivative incumbrancers,¹ whether their interest extends to the whole or part only of the mortgaged property. It has been held in some cases that the manager of a Hindu family, being himself a co-owner, may properly represent a minor member of the family, in a suit for redemption,² but doubt was thrown on this decision in a later case.³ Among the persons, entitled to redeem under section 91, are the surety for the payment of the mortgage-debt, and the judgment-creditor who has attached the mortgagor's interest. "As to the latter, if he has not attached, he is not a necessary party to a suit on the mortgage."⁴ Nor according to English cases need a surety who had not paid part of the debt be joined.⁵

In a suit for foreclosure or sale, as in a redemption-suit, one of several persons jointly interested cannot sue alone
In suits for fore-
closure. in respect of his share.⁶ If not joined as plaintiffs, they must at least be made defendants. Some reason however must be shown for not joining the other as plaintiffs. "You have no right," said Jessel, M.R., "capriciously to make persons defendants when they ought to be plaintiffs and thus increase the costs of the other defendants."⁷ It was thus held that foreclosure proceedings under the Regulation must relate to the whole debt, or they would be invalid. And in such a case as that supposed it was said:—

"The whole of the mortgage-debt is due to the persons claiming under the original mortgages jointly and not severally, and the mortgagors are entitled to a joint receipt for all sums they may pay in satisfaction of the debt; nor does the foreclosure law contemplate the issue of a notice of foreclosure in respect of a portion of the unpaid debt, except under circumstances which do not exist in this case."⁸

A foreclosure decree cannot operate against a person who is not party to the suit.⁹ A defendant, who was in the position of purchaser

1 Venkata v. Kannam, I. L. R., 5 Mad., 184; 1 Daniel's Chancery Practice, 6th ed., p. 245.

2 Narayan Gop v. Pandurang, I. L. R., 5 Bom., 685; Gan Savant v. Narayan, I. L. R., 7 Bom., 467.

3 Padmakar v. Mahadev, I. L. R., 10 Bom., 21; see too Akoba v. Sakharani, I. L. R., 9 Bom., 429, case of minor represented by widow.

4 Nanjundepa v. Gurulingappa, I. L. R., 9 Bom., 10; Fisher on Mortgages, 4th ed., p. 818.

5 Gedye v. Matson, 25 Beav., 310.

6 See note 4 to section 60.

7 Luke v. South Kensington Hotel Company, 11 Ch. D., p. 127.

8 Bishan Dial v. Manni Ram, I. L. R., 1 All., p. 300; see Kali Prosonno v. Kamini, I. L. R., 4 Cal., 475.

9 Anundo Moyee v. Dhonendro, 14 Moo. I. A., 101; Norender Narain v. Dwarka Lal, I. L. R., 3 Cal., 397.

of the equity of redemption, was thus held to be unaffected by foreclosure proceedings which took place subsequently to the sale under which he derived title, and to which he was not made a party.¹ A decree for sale obtained against the mortgagor, is ineffectual against persons who, prior to the suit have bought part of the mortgaged property from the mortgagor, and therefore as against them the purchaser at the sale under such decree cannot sue for possession.² An exception from the general rule is however admitted in the cases relating to the liability of a Hindu son in respect of the debts incurred and alienations made by his father. It is not necessary that the son should be joined in the suit in order that his interest should be affected.³ The view taken by the majority of the Court in Allahabad that in consequence of this section the interest of a Hindu son in ancestral property cannot be touched in execution of a decree against the father, unless the son was a party to the suit, has not been approved in Madras.⁴

Where the mortgagor had before suit granted a *zur-i-peshgi* lease of the property and the mortgagee obtained a decree for sale and became the purchaser, it was held that he could not oust the *zur-i-peshgidar* whom he had not joined in the suit. He must give him an opportunity of redeeming.⁵ "In this country *patnis*, *zur-i-peshgi* leases, and "interests of that nature are very considerable interests in the land and "cannot be looked upon as mere leases for a term of years which a "mortgagee might have the right to disregard." A *patnidar* therefore, who obtained his lease before the institution of a suit on a mortgage of the same land, but was not joined as a party, was held entitled to a decree for redemption.⁶ It is otherwise, if an interest is created by the mortgagor after suit, for then the doctrine of *lis pendens* applies. All alienees who take *pendente lite* are bound by the decree though not parties to the suit.⁷ In a case decided on appeal by the Privy Council one Khogendra, having, during the pendency of a foreclosure suit, become a purchaser of part of the property, was joined as a defendant. On his

1 *Brajanath v. Khilat Chandra*, 8 Beng. L. R., 104.

2 *Hargu Lal v. Gobind Rai*, I. L. R., 19 All., 541.

3 *Ponnappa v. Pappuvayyengar*, I. L. R., 9 Mad., p. 351; *Mayne's Hindu Law* § 296.

4 *Badu Prasad v. Madan Lal*, I. L. R., 15 All., 82; *Bhawani Prasad v. Kallu*, I. L. R., 17 All., 537; *Ramaswamy v. Virasami*, I. L. R., 21 Mad., 222.

5 *Radha Pershad v. Monohur*, I. L. R., 6 Cal., p. 319; *Venkata v. Kannam*, I. L. R., 5 Mad., 184.

6 *Kasimunnissa v. Nilratna*, I. L. R., 8 Cal., pp. 79, 87.

7 *Anundo Moyee v. Dhonendro*, 14 Moo. I. A., 101; see section 52.

setting up a title paramount to the mortgage and not accepting the position of one who should either redeem or be foreclosed, he was dismissed from the suit with costs. In a suit subsequently brought by the mortgagee, who had purchased under his decree, to recover possession from Khogendra's representative, it was held that they were precluded from making any claim to redeem, having in the previous suit by their allegation of paramount title caused the dismissal of the suit against them.¹ Where the purchaser in execution of a money-decree against the mortgagor did not obtain possession, and did not obtain a certificate until after decree in a suit brought on the mortgage, it was held that the purchaser under the latter decree, having had no notice of the prior purchase, could not be displaced from his possession by the prior purchaser, although the prior purchaser was not a party to the mortgage suit.²

It has been said in some cases that a prior mortgagee suing on his mortgage is not bound to join subsequent incumbrancers.³ It may be doubted whether this was ever a correct statement of the law, but clearly in omitting so to join them the prior mortgagee always ran the risk of the subsequent incumbrancer intervening with a claim to redeem.⁴ Thus where property was sold under a decree made in respect of a mortgage of 1871 and the purchaser sued to redeem a prior mortgage, it was held that one of the defendants being a mortgagee holding under an instrument of 1873 and not having been made a party to the mortgage-suit should be treated as if the former decree had not been passed and allowed an opportunity of redemption.⁵ Now it is clear, as stated above, that if subsequent mortgagees are deliberately omitted, the suit is liable to be dismissed. The Court has to decide whether the suit should be dismissed or the omitted parties brought on the record.⁶ The puisne-mortgagee, being in the position of a purchaser of the equity of redemption,

1 Nilakant v. Suresh Chandra, I. L. R., 12 Cal., 414.

2 Nanjundepa v. Gurnlingapa, I. L. R., 9 Bom., 10; Luke v. South Kensington Hotel Company, 11 Ch. D., 121.

3 Khub Chund v. Kalian, I. L. R., 1 All., 240; Ali Hassan v. Dhirja, I. L. R., 4 All., 518.

4 Sitaram v. Amir Begam, I. L. R., 8 All., 324; Damodar v. Naro, I. L. R., 6 Bom., 11; see form of decree, p. 14; Shivram v. Gonu, *ib.*, 515; Dullabhdas v. Lakshmandas, I. L. R., 10 Bom., 88; Mohan Manor v. Togu Uka, *ib.*, 224; Dadoba v. Damodar, I. L. R., 16 Bom., 487; Desai Lalubhai v. Mundas, I. L. R., 20 Bom., 390; Namdar v. Karam, I. L. R., 13 All., p. 318; Venkata v. Kannam, I. L. R., 5 Mad., 184; and see note to section 75.

5 Muhammad v. Man Sing, I. L. R., 9 All., 125, followed in Gajadhar v. Mulchand, I. L. R., 10 All., 520; Namdar v. Karam, I. L. R., 13 All., 315.

6 Mata Din v. Kazim, I. L. R., 13 All., 432; Subhan v. Arunachalam, I. L. R., 15 Mad., 487; Sorabji v. Rattenji, I. L. R., 22 Bom., 701.

is entitled to have an opportunity of redeeming, notwithstanding a decree for sale made in a suit to which he was no party. Nor is he bound by the account taken under such decree. He is entitled to have a fresh account taken and time for redeeming allowed to him.¹ He is not precluded from suing the prior mortgagee by the fact that he has already sued the mortgagor.² On the other hand the purchaser in execution of such a decree does not buy the property free from incumbrance, as he would if buying under the power of sale given in an English mortgage. He takes only such interest as the mortgagor and the mortgagee could convey.³ In settling the terms upon which the second mortgagee should be allowed to redeem the prior mortgage, no regard should be paid to the amount realized on the sale which has already taken place. Whether the purchaser is the prior mortgagee himself or a stranger, whether the purchase-money exceeds, or falls short of, the sum due upon the mortgage, it is this sum only that the second mortgagee has to pay before he can be entitled to a decree for sale. The decree in such a suit should provide that any surplus after payment of the second mortgagee's claim out of the proceeds should go to the defendant who holds the equity of redemption. The result would be to allow the second mortgagee to redeem on the terms on which he would have been so allowed had he been made a party to the first suit.⁴ If however he allows the property to pass into the hands of purchasers at a sale under a mortgage-decree, without any attempt to exercise his right of redemption, he cannot afterwards impeach the sale except on the ground of fraud. Thus in a case where the plaintiffs were mortgagees under an instrument of the 20th October 1877, and the defendants were purchasers at an auction sale under a decree on a mortgage of July 1877, it was held that the plaintiffs, though they had not been made parties to the mortgage suit, had by allowing the property to pass into the hands of strangers lost their security and were bound by the sale. It appeared that, instead of taking any steps to redeem or prevent the sale, they had endeavoured to protect themselves and defeat the prior incumbrancer's decree by purchasing the equity of redemption.⁵ In a

1 Venkata v. Kannam, I. L. R., 5 Mad., 184; Damodar v. Naro, I. L. R., 6 Bom., 11; Shivram v. Genu, *ib.*, 515; Naran v. Dolatram *ib.*, 538; Sankana v. Virupakshapa, I. L. R., 7 Bom., 146; Radhabai v. Shamray, I. L. R., 8 Bom., 168; Dadoba v. Damodar, I. L. R., 16 Bom., 486.

2 Balmakund v. Mussanant, I. L. R., 19 All., 379.

3 Rupchand v. Davlatrav, I. L. R., 6 Bom., 497; Maganlal v. Shakra, I. L. R., 22 Bom., 945; Venkata v. Kannam, I. L. R., 5 Mad., 184.

4 Dip Narain v. Hira Singh, I. L. R., 19 All., 527.

5 Ali Hassan v. Dhirja, I. L. R., 4 All., 518; compare Anundo Moyee v. Dhonen-dro, 14 Moo I. A., 101; Sitaram v. Amir Begani, I. L. R., 8 All., 324.

recent case where the suit was between the first and second mortgagees and related to the proceeds of the mortgaged property which were insufficient to pay off both mortgagees, it was nevertheless held that the mortgagors should be joined, in order that they should have an opportunity of being present at the taking of the accounts and in order to entitle the parties to the suit to obtain costs out of the sale-proceeds.¹

Foreclosure and Sale.

86. In a suit for foreclosure if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

Decree in foreclosure-suit.

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

Commentary.

The rights of the mortgagees against the property having been generally described in section 67, this section and the following sections show in what forms decrees may be made in suits brought by mortgagees. What form the decree should take depends on the nature of the

¹ Hughes v. Delhi and London Bank, I. L. R., 15 Cal., 85.

particular mortgage. With a mortgage by conditional sale or an English mortgage, it is a foreclosure-decree. With an English mortgage the Court has also power to pass a decree for sale and with a simple mortgage that is the only possible decree. In the case of simple mortgages and English mortgages the mortgagee has further the security of a covenant for payment; but neither in the foreclosure-decree under this section nor in the sale-decree (section 88) is there any provision for an order for payment enforceable against the mortgagor personally. As the mortgagee clearly cannot reserve his personal remedy for another suit, it is submitted that effect ought to be given to it, *e.g.*, in the mortgage-decree.¹ So in England under the present system the mortgagee can enforce his two remedies in one suit.² As to the decree for sale, see note 1 to section 88.

Allowance being made for the fact that the parties are ranged on different sides of the record according as the suit is one for foreclosure or redemption, there is no difference between the decrees in the two suits. The opportunity allowed to the mortgagor to redeem and the price of redemption is the same. In a case in Calcutta, tried on the original side of the High Court it was said³ :—

Mortgage decrees generally. “We think that the essence of foreclosure and redemption-suits is, that in such suits each party is entitled to enforce his rights. A plaintiff claiming foreclosure is bound upon the accounts being taken, if the balance is against him to pay the balance. On the other hand, a plaintiff claiming redemption must submit to a decree for sale or foreclosure if he makes default in payment. Unless this were so there would be multiplicity of suits. To avoid this it is necessary under a decree for foreclosure or redemption that the accounts between the parties should be settled or discharged.”

Thus in either decree an account is ordered to be taken of the amount due, and a time is fixed within which it is to be paid.

In the ordinary case where the mortgagor is in possession the account to be taken is simply an account of what is due to the mortgagee for principal and interest. *Accounts against mortgagor, burden of proof, interest.* As far as the rents and profits of the land are concerned the mortgagor remaining in possession is not accountable for them, nor can he charge for monies expended on it.⁴ The burden of

1 Doolal Chunder v. Goluck, 22 W. R., 360; Muni Reddi v. Venkata, 3 Mad. H. C., p. 243; see however Kanchan v. Brij Nath, I. L. R., 19 Cal., p. 340; Umes Chunder v. Zahur Fatima, I. L. R., 18 Cal., p. 180.

2 Farrer v. Lacy Hartland & Co., 31 Ch. D., 42; Poulett v. Hill, (1893) 1 Ch., 277.

3 Doolee Chand v. Omda Khanum, I. L. R., 6 Cal., p. 378.

4 Fisher on Mortgages, 4th ed., p. 843; see section 66.

proving what is due lies on the mortgagee.¹ As to the principal amount advanced, the statement made by the mortgagor in the instrument of mortgage is *prima facie* evidence as between the parties. Like any other statement made and accepted by both parties, it is evidence against the parties to the instrument, the weight of which depends on the circumstances.² The fact that receipt of the money has been admitted before the Registrar throws on the mortgagor the burden of proving that the money has not been advanced.³ But evidence to show that a smaller consideration or no consideration passed is admissible.⁴ As against third persons the statement is no more evidence than any other statement.⁵ In a case where the mortgagee refused to put the mortgage-bond in evidence, it being unstamped, the Court ruled that he could only be credited with the amount which the defendant admitted to have been the amount of the principal.⁶

The principal due having been ascertained either at the trial or by the taking of an account under directions given in the decree, interest at the contract rate up to the day fixed for payment is added. The ordinary practice has been to allow further interest after that date at the rate of six per cent.⁷ (section 209, Civil Procedure Code). This practice however is according to a recent decision in Allahabad erroneous, it being considered that the power to grant further interest under the Code is excluded by the language of sections 86 and 88 of this Act. Reference is made to the phrase 'so found due' in section 80 and it is said that it must denote the principal and interest calculated up to the day fixed for payment and no further, and that there is no provision for additional interest.⁸ There would be more force in this argument, if the Legislature had been more strictly consistent in their language. But in other sections

1 Ganga v. Bayaji, I. L. R., 6 Bom., 669.

2 Chowdry Deby Persad v. Chowdry Dowlut, 3 Moo. I. A., 347; Juneswar v. Mahabeer, I. L. R., 3 I. A., 1.

3 Nawab Mirza Ali v. Indar Pershad, I. L. R., 23 I. A., 9; Ali Khan v. Indar Pershad, I. L. R., 23 Cal., 950.

4 Ram Surun v. Mussamut Pran Peary, 13 Moo. I. A., 551; Vasudeva v. Narasamma, I. L. R., 5 Mad., 6; Naoroji v. Karji Sidick Mirza, I. L. R., 20 Bom., 636.

5 Brajeshware v. Budhanuddi, I. L. R., 6 Cal., 268; see Rajah Sahib Prahlad v. Baboo Budhoo, 12 Moo. I. A., 275.

6 Ganga v. Bayaji, I. L. R., 6 Bom., 669.

7 Rafikunessa v. Tarim, I. L. R., 20 Cal., 279; Suryanarain v. Jogendra, ib., 360; Chakurbhin v. Harbhanji, I. L. R., 20 Bom., 744; Subbaraya v. Punnusami, I. L. R., 21 Mad., 364; Ramachandra v. Devia, I. L. R., 12 Mad., 485; see Ordo v. Skinner, I. L. R., 3 All., 107.

8 Amolak v. Lachim, I. L. R., 19 All., 174; see Bhawani Prasad v. Brig Lal, I. L. R., 16 All., 269.

the phrase is changed. In section 89 it is "the amount due under the mortgage" in default of payment whereof an order absolute is to be made for sale. In section 90 it is "the amount due for the time being on the mortgage," and section 97 directing the application of the proceeds of sale refers "to all interest due on account of the mortgage." Further interest is also demanded according to the form of plaint (No. 109) given in the Appendix to the Code. Having regard to these and other considerations Jenkins, J., refused to follow the ruling in the Allahabad case.¹ This question as to further interest may be said to be part of the larger question how far the provisions of the Code which was passed in the same year as this Act are to be read with the Act. The insertion in the Appendix to the Code of forms to be used in mortgage-suits favours the idea that the Code and the Act are to be read together. And if that is not intended it is clear that the rules made under section 104 ought to embody in some form or other many of the provisions which are found in the Code, *e.g.*, sections 306 to 319. At the same time as regards some of the provisions of the Act it may well have been intended that Courts should look to them exclusively (see note to section 89).

If the time for payment is extended, as it may be under section 87, interest has to be calculated up to the substituted date; and if there is an appeal the appellate decree, which then becomes the final decree capable of execution, should fix a date within six months for payment. But if no day is fixed and there is a mere confirmation of the original decree, the direction therein contained as to time must still hold good and it cannot be presumed that the Appellate Court intended the time for payment to run from the date of their decree.²

Ordinarily the intention of the parties to a mortgage is that interest shall be charged, not up to the due date only, but up to the date of payment, and regard should be had to this intention in construing instruments in which there is no express stipulation for payment of interest after the date on which the principal is covenanted to be paid.³

1 *Achalabala v. Surendra*, I. L. R., 24 Cal., 766.

2 *Manavikraman v. Muniappan*, I. L. R., 15 Mad., 170; *Kanara v. Govinda*, I. L. R., 16 Mad., 214; *Chiranjī v. Dharan Singh*, I. L. R., 18 All., 455; see, however, *Noor Ali v. Konimeah*, I. L. R., 13 Cal., 13; *Rup Chand v. Shamsh-ul-jehan*, I. L. R., 11 All., 346; *Daulat v. Bhukandas*, I. L. R., 11 Bom., 172.

3 *Mathura Das v. Raja Narindra*, I. L. R., 19 All., 39; *s.c.*, I. L. R., 23 I. A., 138, followed in *Pedda Subbaraya v. Ganga*, I. L. R., 20 Mad., 149, and *Nityananda v. Sri Radha*, *ib.*, 371, disapproving *Narindra v. Khadim*, I. L. R., 17 All., 581, on the question of construction. In *Manager Vithoba v. Vigneswara*, I. L. R., 22 Bom., 107, the conduct of the mortgagor in paying interest after the due date was relied on; see also *Bindesri v. Gangasaram*, I. L. R., 25 I. A., 9.

But even if the intention is clear that interest is not to be paid after that date, interest may still be recoverable by way of damages under Act XXXII of 1839 and the rate allowed will *prima facie* be the same as that stipulated in the contract.¹ That rate is adopted as the measure of damages unless it is excessive or extraordinary. In the case just cited the contract rate of 15 per cent. per annum was so adopted by the Judicial Committee. An opinion is also expressed in this case with regard to the rule of limitation by which a claim for such interest should be governed. It is said that the claim is a recurring one and that article 115 or 116 of the schedule would be applicable. In the ordinary case as long as the principal was not time-barred six years' interest would thus be recoverable. The effect of this is practically to overrule several cases in which it was held that no interest was recoverable since the suit was not brought within six years of the date of the original breach of the contract.²

In holding that article 115 or 116 should be applied, the Judicial Committee must be taken to have assumed that the sum recoverable by way of damages was not charged on the land so as to make article 132 applicable; but no opinion is expressed on this point and the language in the concluding part of the judgment rather suggests the contrary view because the directions given imply that this sum is to be treated as part of the mortgage-money. The authorities in this country are conflicting on this point. In Calcutta it has been held that the interest recoverable under the Transfer of Property Act as part of the mortgage-money includes alike the interest agreed upon in the instrument of mortgage and the interest which may be given as damages under the Act of 1839,³ and this case has been followed in Madras.⁴ The English cases support this view, for there seems to be no doubt that on redemption the mortgagor is bound to pay interest of either kind.⁵ Admitting that the law is otherwise in England, the Allahabad High Court holds that the term interest used in this chapter means only the agreed interest and that in respect of any other sum, not being part of the

1 Chajmal v. Brij Bhukan, I. L. R., 17 All., 511; Cook v. Fowler, L. R., 7 H. L., 27.

2 Gudri Koer v. Bhubaneswari, I. L. R., 19 Cal., 19; Moti Sing v. Ramohari, I. L. R., 24 Cal., 699; Narindar v. Khadim, I. L. R., 17 All., 581; Badi Bibi v. Sani Pillai, I. L. R., 18 Mad., 257; Thayai Ammal v. Lakshmi, *ib.*, 331.

3 Bikramjit v. Furga Dyal, I. L. R., 21 Cal., 274; but see Moti Singh v. Ramshari, I. L. R., 24 Cal., 699.

4 Ramareddi v. Appaji, I. L. R., 18 Mad., 248; Krishna v. Varadarajulu, *ib.*, 338.

5 Gordillo v. Weguelin, 5 Ch. D., 267.

mortgage-money, the mortgagee is entitled to a decree for money only.¹ The point has not been decided in Bombay.²

There is now no statutory law in force limiting the rate of interest claimable by a creditor and a stipulation for compound interest is valid.³ The amount claimable on account of interest may however be limited by the rule of *damdupat*, that is, the rule of Hindu law which prohibits a creditor from recovering at any one time an amount exceeding the principal sum. This rule is enforced as between Hindus in the High Court of Bengal exercising its original jurisdiction and also in the Bombay Presidency, and is applicable to mortgages. In the case of a mortgagee in possession against whom an account of rents and profits has to be taken the rule is not applied, since it would be inequitable that interest should cease to be allowed when it amounts to the same sum as the principal and that at the same time he should be chargeable with the rents and profits.⁴ A similar rule was enacted for the Bengal Mofussil and for Madras by Regulation XV of 1793 and XXXIV of 1802, which however were repealed in 1855 and 1869 respectively.⁵ The question whether a stipulation for enhanced interest should be regarded as penal must be answered with reference to the provisions of section 74 of the Contract Act. The result of the cases on that section seems to be that, while such stipulation, if made to take effect only from the date of default, is not penal, it is of a penal character and is therefore not enforceable, when the higher rate of interest is to be calculated from the date of the loan.⁶ Besides the interest on the mortgage-debt, interest is generally allowed on the payments credited to either party on taking the accounts. It will be seen that interest is to be calculated up to the date fixed for payment, and it may be presumed the Court would, on enlarging the time for payment under the third paragraph of

1 *Narindra v. Khadim*, I. L. R., 17 All., 581; *Rikhi Ram v. Sheo Parshan*, I. L. R., 18 All., 316.

2 *Manager Vithoba v. Vigneswara*, I. L. R., 22 Bom., 109.

3 See *ante* p. 197, and *Bandaru v. Atchayamma*, I. L. R., 3 Mad., 125; *Ganga Pershad v. Land Mortgage Bank*, I. L. R., 21 Cal., 368.

4 *Nobin Chunder v. Romesh*, I. L. R., 14 Cal., 781; *Lall Behary Dutt v. Tacamoney Dossee*, I. L. R., 23 Cal., 899; *Nathubhai v. Mulchand*, 5 Bom. H. C., (A. C.), 196; *Ganpat v. Adarji*, I. L. R., 3 Bom., 312; *Hari Muhadaji v. Balambhat*, I. L. R., 9 Bom., 233; *Balkrishna v. Hari Govind*, I. L. R., 15 Bom., 84; *Shri Ganesh Dharnidhar v. Keshavray*, *ib.*, p. 640: this last case is overruled in *Gopal Ramchendra v. Gangaram*, I. L. R., 20 Bom., 721; *Thondshett v. Raoji*, I. L. R., 22 Bom., 86.

5 *Annaji Rau v. Ragubai*, 6 Mad. H. C., 400.

6 See *Dullabhdas v. Lakshmadras*, I. L. R., 14 Bom., 200; *Sajaji v. Maruti*, *ib.*, 274, where cases are cited; *Surya Narain v. Jogendro*, I. L. R., 20 Cal., 360; *Narayanasami v. Narayana*, I. L. R., 17 Mad., 62.

section 87, direct that interest should continue to run during the extended time.¹ The amount fixed by the decree, except so far as it may be increased by the addition of costs under section 94, is the amount for which sale under the decree will be ordered and it cannot be increased by mere agreement of the parties.²

In England the accounts are ordinarily taken thus:—the sums received are set down in one column, the interest due and the costs in a second column, and the capital debt in the third; and at the conclusion of the account the sums received in the first column are deducted from the aggregate of the principal and the interest and the costs in the two other columns.³ It is not open to a mortgagee, after obtaining a decree for an account and sale, on ascertaining that the accounts are going against him, to withdraw from the taking of accounts.⁴ Where it appears that there is nothing due to the mortgagee or that he has been overpaid, his suit will be dismissed with costs. In the latter case it is usual also to order that he should pay over the balance with interest from the date of institution of the suit.⁵

Except in cases where the usufructuary mortgagee is by the contract entitled to take the profits in lieu of interest, or in lieu of interest and in payment of fixed portions of the principal, in which cases no accounting on his part is necessary,⁶ the mortgagee in possession is always accountable for the rents and profits as also for any liabilities incurred in respect of the duties imposed by section 76, and an order directing that an account shall be taken becomes a necessary part of any decree. If by the contract it has been agreed that the accounts shall be taken in any particular way, effect will be given to the agreement, provided that it is not unreasonable.⁷

The mode in which the accounts should be taken here has been thus summarised:—

“The gross collections are ascertained at the end of each year, and after deducting the necessary outlay on account of revenue expenses, of collection and

1 Fisher on Mortgages, 4th ed., 909.

2 Kaashi Prasad v. Sheo Sahai, I. L. R., 19 All., 186.

3 Thompson v. Hudson, L. R., 10 Eq., p. 498.

4 Doolee Chand v. Omda Khanum, I. L. R., 6 Cal., 377.

5 Janoji v. Janoji, I. L. R., 7 Bom., 185; Ramachandra v. Janardan, I. L. R., 14 Bom., 20.

6 As to these cases see note to section 77.

7 Radhabenode v. Kripa Moyee, 14 Moo. J. A., 443; see as to mode of accounting, Mokund Lall v. Goluck Chunder, 9 W. R., 572.

"preservation of the estate,¹ the balance goes to reduce, either in whole or in part, the interest, and if there is a surplus over, it goes to the reduction of the principal the account being closed at the end of each year. In England it is not of course to direct annual rests against the mortgagee in possession, but a different rule obtains in this country. If however the mortgage-debt is paid off by means of the rents and profits during the possession of the mortgagee, he will ordinarily be liable to pay interest on all subsequent receipts."²

This passage is quoted with approval by Mahmood, J., in a case where the plaintiff had been compelled to pay the Government revenue which according to the terms of the usufructuary mortgage under which

the defendant held he ought to have paid. It was
Annual rests. held that, in taking the accounts between the parties,

the plaintiff was entitled to credit for sums so paid and to avail himself of annual rests.³ The direction to take the accounts with rests against the mortgagee in possession is tantamount to compelling him to accept payment piece-meal, the surplus beyond what is required to meet the interest being applied in reduction of the principal money. Such a direction is not generally made in England, especially when interest was in arrear at the time of the mortgagee taking possession.⁴ But when principal as well as interest has been paid off, he becomes liable to rests.

"The principle on which annual rests are not ordered as against mortgagees in possession, whose interest was in arrear at the time when they entered into possession, is, that it cannot be considered that in so doing they elected to receive their capital by dribble. They are entitled in the absence of any bargain to the contrary to have their whole capital paid off at once, and the taking of possession is not evidence of such a bargain. But after they have been paid in full, they are, as was pointed out by the Master of the Rolls in *Wilson v. Metcalfe*,⁵ persons who are, in receiving the rents after their debt has been fully paid, availing themselves of another man's money for their own use and benefit and they ought to be charged with interest. In that case annual rests were directed to be made from the time at which the mortgage-debt was fully paid and that is what I have always understood to be the practice."⁶

When annual rests are ordered the decree should contain such a direction as the following:—

Take an account, &c., and in taking the said account, make annual rests of the clear balance, and compute interest on such respective balances at . . . per cent.; and in making such annual rests, except the first, include in the balance then stated the interest on each preceding balance, so as to charge the defendant with compound interest thereon.

1 i.e., the sums which section 72 authorises, and section 76 obliges, him to spend; *Lakshman v. Hari Drinker*, I. L. R., 4 Bom., 584.

2 Tagore Lectures, 1875-76, p. 254, cited in I. L. R., 6 All., p. 310.

3 *Jajit v. Gobind*, I. L. R., 6 All., 303.

4 *Fisher on Mortgages*, 4th ed., p. 872.

5 1 Russ., 530.

6 *Per North, J., Ashworth v. Lord*, 36 Ch. D., p. 550.

Or :—

Make annual rests in account of the rents received by, and on the occupation-rent accrued due from, the late A B in his life-time; and also on the rents received by, and occupation-rent accrued due from, the said defendants or any of them since the death of A B; and compute interest after the rate of . . . per cent. upon such rents and occupation-rents respectively.¹

The order of payments above stated agrees with that prescribed in section 76, clause (h). In clause (d) of the same section however a different order is given, it being there provided that repairs should be paid for out of the balance remaining *after* payment of interest as well as revenue. Whether the account is to be taken with rests or generally according to the mode adopted in England is not clearly explained in section 76, clause (h). Where the mortgagee being in possession has to pay rent, the mortgagor is entitled to deduct the arrears due from the amount found due by him, though any suit for them might be barred. But against a second mortgagee, who is entitled to the surplus proceeds after discharging the principal and any interest that may be due to the prior incumbrancer, the latter is not entitled to treat arrears due to him by way of rent as interest for which he has a charge on the property.² In a recent case decided by the High Court of Bengal, in which a mortgagee in possession was plaintiff and his mortgagor defendant, it appeared that the plaintiff had obtained a decree on his mortgage-deed in May 1862, but that he claimed that previously to the mortgage he had entered under a zur-i-peshgi lease granted by the defendant's predecessor in title, on the expiry of which he remained in possession under an arrangement with the defendant.³ On these facts the Court laid down the manner in which the accounts should be taken in the following terms :—

"We are of opinion that an account should be taken half-yearly of the interest "due from the mortgagor under the mortgage-deed; and from such half-yearly "amounts of interest should be deducted the rent payable but unpaid by the mortgagee during such half-year under any contract for possession, separate and independent of the mortgagee; and if for any period the mortgagee was in possession, "rent became due under any such separate or independent contract during such "period, he should be charged as a mortgagee in possession. The balance of interest "half-yearly (if any) will not carry interest up to the date of the decree. But an "account must be made up, as on the date of the decree of the 12th May 1862, of the "principal and interest, after making such deductions as I have mentioned, due to "the plaintiff at that time. Upon the aggregate amount interest will again be "calculated at one per cent. per mensem, and against the subsequent half-yearly

1 *Fisher on Mortgages*, 4th ed., p. 874.

2 *Sivarama v. Subramanya*, I. L. R., 9 Mad., 57.

3 *Doolee Chand v. Omda Khanum*, I. L. R., 6 Cal., p. 380.

"accounts must be set-off the amounts payable and unpaid by the mortgagee in respect of rent under any contract for possession separate and independent of the mortgage; and for any period uncovered by such separate and independent contract such sum as should be charged against a mortgagee in possession.

"The accounts being so taken, the mortgagor must pay the balance, if any, found due from him on such account, to the plaintiff, the mortgagee. On the other hand if a balance is found due from the plaintiff, the mortgagee, to the defendant, the plaintiff must pay over such balance to the defendant."

The mortgagee's right to charge interest is not affected by the fact that the arrears are barred by limitation. Although he could not recover them in a suit, his right of retainer is not thereby affected.¹

The general rule is that the mortgagee is entitled to all costs which he properly incurs as mortgagee in relation to his security, and interest thereon if allowed, and to have them added to the amount due on it.² And the rule is recognized in this section, in section 92 relating to decrees in redemption-suits, and in section 91 relating to costs subsequent to decree. Lord Cottenham, C., in stating the rule, said:—

"The Court in settling the accounts between a mortgagor and mortgagee, will give to the latter all that his contract or the legal or equitable consequences of it entitle him to receive, and all the costs properly incurred in ascertaining and defending such rights, whether at law or in equity. . . In *Detillin v. Gale*³ Lord Eldon says he ought to be indemnified to the extent that he acts reasonably as mortgagee; which must mean reasonable with respect to such rights as his mortgage-title gives him."⁴

The mortgagee may however by his conduct disentitle himself to his costs, if, for instance, he incurs costs after a proper tender is made to him,⁵ or denies the mortgagor's right to redeem, or institutes a suit on the mortgage when nothing is due to him, or retains possession claiming the property as his own after he has been fully paid;⁶ or when, upon an account taken after a sale of the mortgaged property, it appears that a larger balance remains in the mortgagee's hands than what was admitted

¹ *In re Marshfield*, 34 Ch. D., 721; *Edmunds v. Waugh*, L. R., 1 Eq., 418; *Mellersh v. Brown*, 45 Ch. D., 225; *Daudbhai v. Daudbhai*, I. L. R., 14 Bom., 114.

² *National Provincial Bank v. Games*, 31 Ch. D., p. 592; see *Eardley v. Knight*, 41 Ch. D., 537, as to interest.

³ 3 Ves., p. 584.

⁴ *Dryden v. Frost*, 3 My. & Cr., p. 675; *Bank of New South Wales v. O'Connor*, 14 App. Cas., p. 278.

⁵ *Id.*; *Dhondo v. Balkrishna*, I. L. R., 8 Bom., p. 193; and see Rule 9 of the Rules of the Calcutta High Court, (Rule 269, Madras), printed in Appendix II, and *Fisher on Mortgages*, 4th ed., p. 912, and *ante* p. 265.

⁶ *Ashworth v. Lord*, 36 Ch. D., 545.

by him.¹ And generally if he incurs costs unnecessarily or causes them to be so incurred, he may be charged with them. Thus when the bargain was found to be an usurious one, and the costs were consequently thrown on the mortgagee, the High Court of Bombay refused to interfere with the order.² In a case where the mortgagee had been ordered to pay the plaintiff's costs in a redemption-suit, it was ruled by Pontifex, J., that the plaintiff was entitled to set-off the amount so due to him against the mortgage-money payable by him, notwithstanding any claim in the way of lien for costs made by the mortgagee's solicitor.³ The costs of the suit allowed in the decree are added to the mortgage-amount, so that in respect of them the mortgagee enjoys the same priority as in respect of the mortgage-money. The costs chargeable against the mortgagor do not include remuneration for professional services rendered by the mortgagee as solicitor or otherwise;⁴ and it has further been held that a stipulation for payment of such profit-costs to a solicitor or auctioneer before redemption is invalid, as being an undue restraint on the right of redemption.⁵

The Act makes no provision for cases where there are successive incumbrances to be dealt with in one decree. The mortgagor himself is not entitled to further time, because he has executed subsequent mortgages in favour of other persons. He has only one time to redeem. But as between the mortgagees, when they have proved their mortgages and there is no question of priority between them, the practice has been on the request of the defendant to allow successive periods of redemption, and accordingly the decree is made to consist of parts, each part being itself a complete decree for redemption or in default for foreclosure. In the first part the first assignee of the right of redemption, *i.e.*, the second mortgagee, is directed to redeem on paying what is due to the first mortgagee, otherwise to be foreclosed. Then in case he should make default, it is provided in the second part that the third mortgagee may similarly redeem or be foreclosed, and so on with the other mortgagees.⁶ In case however the second mortgagee should redeem the first, it

1 *Charles v. Jones*, 35 Ch. D., 544.

2 *Carvalho v. Nurbibi*, I. L. R., 3 Bom., 202.

3 *Brijnath v. Juggernath*, I. L. R., 4 Cal., 742, followed in *Sidu v. Bali*, I. L. R., 17 Bom., 32.

4 *In re Wallis*, 25 Q. B. D., 177.

5 See *ante* p. 207.

6 *Platt v. Mendell*, 27 Ch. D., p. 248; for form, see *Bartlett v. Rees*, L. R., 12 Eq., 395, and *Fisher on Mortgages*, 4th ed., p. 1009; *Hallett v. Furzo*, 31 Ch. D., 312.

is provided that on payment of the amount necessary to effect such redemption, as well as of the amount due on the second mortgagee's mortgage, the third mortgagee should have liberty to redeem the second, and so on with subsequent incumbrancers. In this way the decree provides for each contingency, and whether the second and subsequent mortgagees redeem the incumbrances prior to them or are foreclosed, the result in the end is that two parties alone remain, the owner of the equity of redemption and the party who has either foreclosed or paid off all the other incumbrancers. On the same principle a decree was made by the Bombay High Court in a suit between the plaintiff as second mortgagee and the defendant as first mortgagee, having an additional charge. As subsequent incumbrancer the defendant was allowed three months to redeem the plaintiff's intermediate incumbrance, while the plaintiff as second mortgagee was allowed a further term of three months to redeem the defendant's first mortgage.¹

In a case not decided under the Act, where a suit was brought by a second mortgagee against his mortgagor and a third mortgagee asking for an account and sale, the first mortgagee having already obtained such a decree, the following decree was made:—

"Decree for an account of principal and interest due on the mortgage to the plaintiff, in default of payment the property to be sold and plaintiff to be paid first, after satisfaction of the decree of B (the first mortgagee), if there is then a surplus, account to be taken of what is due to C (the third mortgagee), and surplus to be applied for payment of his claim. If property has been sold under previous decree, claims to be satisfied out of surplus."²

Where a sub-mortgagee is party to a mortgage-suit as plaintiff or defendant, the decree directs an account to be taken of what is due to the original mortgagee and of what is due to the sub-mortgagee. On payment to him of the latter sum, not exceeding what is due to the original mortgagee, and of any balance to the latter, both original and derivative mortgagee re-convey to the mortgagor. On default of payment the mortgagor is foreclosed, and the original mortgagee is at liberty to redeem the sub-mortgage; otherwise he may in his turn be foreclosed.³ There is no doubt that a sub-mortgagee joining the mortgagor and mortgagee as parties may institute a suit for sale.⁴

¹ Narayan Venkoba v. Pandurang, I. L. R., 7 Bom., 526; Smithett v. Hesketh, 44 Ch. D., 161; see Tulsa v. Khubchand, I. L. R., 13 All., 581.

² Ahindro v. Ohunnoololl, I. L. R., 5 Cal., 101.

³ Fisher on Mortgages, 4th ed., p. 947; Narayan v. Ganoji, I. L. R., 15 Bom., 692.

⁴ Muthu Vijaya Raghunatha v. Venkatachalam, I. L. R., 20 Mad., 35.

87. If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

Procedure in case
of payment of
amount due.

If such payment is not so made, the plaintiff may [1] apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Order absolute for
foreclosure.

Provided that the Court may, upon good cause shown, [2] and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

Power to enlarge
time.

On the passing of an order under the second paragraph [3] of this section the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV, No. 122, for the words "Final decree," the words "Decree absolute" shall be substituted.

Commentary.

Note 1. On payment by the mortgagor of the sum decreed against him, possession is to be delivered under the decree and he is not to be put to another suit to recover it.¹ Similar provision is made for the like event in sections 89 and 93. The time allowed to the mortgagor clearly cannot be affected by the mere fact of an appeal being preferred against the decree, whether by the mortgagor or the mortgagee. If the appeal is withdrawn and no decree is passed on it, the withdrawal gives the mortgagor no fresh period for redemption.² There are cases which appear

¹ See as to English practice, *Keith v. Day*, 39 Ch. D., 452.

² *Chudasama v. Ishwargar*, I. L. R., 16 Bom., 245; *Patloji v. Gannu*, I. L. R., 15 Bom., 370.

to support the view that the decree of an appellate Court, though silent as to the time allowed for payment and merely confirming the original decree, must be understood as giving further time for payment.¹ This view which is open to the obvious objection that it enables the mortgagor by merely filing an appeal to gain further time for payment has been disapproved in Madras,² Allahabad³ and Calcutta.⁴

Where a defendant in a decree, framed under this section, applied to be allowed to pay the money into Court two days after the prescribed time, pleading that those two days were holidays, and the Court ordered accordingly, it was held that no appeal would lie against this order which was of a ministerial character only, and that the proper course for the decree-holder was to apply for an order absolute.⁵

The order absolute under this section is analogous to the order absolute for sale which may be made under section 89. The form of the order is given in the schedule to the Civil Procedure Code, No. 129. The effect of it is to vest the property absolutely in the mortgagee⁶ and, as provided in this section, to extinguish the debt. If necessary, the decree may contain an order for possession.⁷

Note 2. According to the view taken in Calcutta, the mortgagor's right to redeem is not affected by the order *nisi* passed under section 86 and therefore may be exercised at any time before the order absolute is passed.⁸ Accordingly as long as no such order has been passed, no question arises of showing good cause under the proviso to this section or section 93. This view has been followed in some recent cases in Allahabad,⁹ but in an earlier case in that Court it was ruled that except for good cause shown there could

1 Noor Ali v. Koni Meah, I. L. R., 13 Cal., 13; Rup Chand v. Shamsh-ul-jehan, I. L. R., 11 All., 346; Daultat v. Bhukandas, I. L. R., 11 Bom., 172.

2 Manavikraman v. Muniappan, I. L. R., 15 Mad., 170; Kanara v. Govinda, I. L. R., 16 Mad., 214; see as to this case Vallabha v. Vedaputratti, I. L. R., 19 Mad., 40.

3 Chirangilal v. Dharan Singh, I. L. R., 18 All., 455.

4 Bholu Nath v. Kanti Chunden, I. L. R., 25 Cal., 311.

5 Hulas Rai v. Pirthi Singh, I. L. R., 9 All., 501; see Damodar Das v. Gokal, I. L. R., 7 All., p. 94.

6 Ladd v. Babaji, I. L. R., 7 Bom., 533; Subhana v. Krishna, I. L. R., 15 Bom., 644.

7 Ammannan v. Gurnumathi, I. L. R., 16 Mad., 64.

8 Poresb Nath v. Ramjodu, I. L. R., 16 Cal., 246; followed in Ajudhia v. Baldeo, I. L. R., 21 Cal., 824.

9 Raham Illahi v. Ghasita, I. L. R., 20 All., 375; Nihali v. Mittar Sen *ib.*, 446.

be no enlargement of the decreed time whether the order absolute under section 87 or section 93 were applied for or not.¹ In Bombay in cases decided before the Act came into operation, or where the decree was made before that date, it has been held that the Court cannot enlarge the time fixed by the decree.² In a case decided under the Act the same Court has held that under the proviso to section 87 and the proviso to section 93 there is power on good cause shown to enlarge the time for redemption on the mortgagor's application made at any time before the final decree has been passed.³ In Madras it is considered that although the right of redemption may still exist, the mortgagor must comply with the strict terms of the decree if he desires to effect redemption of his property. It is open to him to apply for enlargement of the time, if the mortgagee on his part applies for an order absolute, but otherwise he cannot after the expiration of the fixed period obtain redemption under the decree.⁴ According to English practice the application for further time may be made even on the hearing of the mortgagee's application to make the foreclosure absolute. By way of cause, it may be shown that the mortgagor has prospects of raising the required money, that he is endeavouring to find an assignee or the like;⁵ and in granting time the Court has regard to the magnitude of the sum involved, the arrears of interest, and the value of the security, and generally requires as a condition precedent that interest and costs be paid on the day originally fixed.⁶ The mere fact that an appeal has been lodged is not sufficient ground for enlarging the time.⁷ There may be more than one application under the proviso, but naturally some stronger ground has to be shown on the second or third than on the first application.⁸

Note 3. Foreclosure does not according to English practice have the effect of discharging the debt. On the contrary the mortgagee may pursue all his remedies at once, "he may bring action of covenant and ejectment,

*Discharge of debt
on foreclosure.*

1 *Ram Lal v. Tulsa Kuar*, I. L. R., 19 All., 183, disapproving *Poresh Nath v. Ram-jodu*, I. L. R., 16 Cal., 246.

2 *Mahant v. Ishwargar*, I. L. R., 13 Bom., 106; *Subhana v. Krishna*, I. L. R., 15 Bom., 644; *Chennaya v. Malkapa*, I. L. R., 20 Bom., 279.

3 *Nauchram v. Balaji*, I. L. R., 22 Bom., 771.

4 *Vallabha Valia v. Vedapuratti*, I. L. R., 19 Mad., 40; *Elayadath v. Krishnan*, I. L. R., 13 Mad., 267; in *Kunaker v. Govind*, I. L. R., 16 Mad., 214, the decree contained no direction under the last paragraph of section 92; see note to section 60 as to question when a second suit for redemption may be brought.

5 Compare Code of Civil Procedure, section 305.

6 *Fisher on Mortgages*, 4th ed., 953.

7 *Ishwargar v. Chudasama*, I. L. R., 13 Bont., p. 109; *Aminabi v. Sidu*, I. L. R., 17 Bom., 547.

8 *Fisher on Mortgages*, 4th ed., p. 954.

"and at the same time proceed to foreclose the mortgage". If he sues on the covenant and does not get fully paid, he may still go on and foreclose the mortgage. But if he has foreclosed the mortgage, equity will not permit him to sue on the covenant, except on the terms of a new right of redemption being given to the mortgagor, and under such circumstances the foreclosure is said to be 'opened.'¹ A foreclosure-decree is also said to be opened in cases where it is shown to have been obtained by fraud, the circumstances being such that other decrees would be set aside.²

Under this clause the injustice of the mortgagee taking the estate and the debt too is obviated by the discharge of the debt on foreclosure. But in a case where there are two successive mortgages of the same estate to the same person, the question may arise whether the principle of opening the foreclosure should not be admitted in order to prevent the mortgagee from foreclosing the first mortgage, and then proceeding against the mortgagor personally on the second mortgage under section 68. In a case, complicated by the circumstance that a transferee of the two mortgages had himself purchased part of the mortgaged property, it was held that he could not be allowed to adopt this course, and a decree was made by which the debts were apportioned upon the various estates mortgaged according to the principle of contribution, liberty being reserved to the defendant to redeem on paying a sum bearing the same proportion to the mortgage-debt as the aggregate values of all the mortgaged properties other than that purchased by the plaintiff would bear to the value of the property so purchased.³ When the plaintiff first obtained a foreclosure decree on his mortgage of 1864, which decree on the defendant's default became absolute, and afterwards in 1882 sued the defendant personally to recover a further advance made on the security of the same property in 1873, it was held that, while the defendant might have pleaded in the foreclosure-suit that the plaintiff could not foreclose without abandoning his claim to the further advance, his omission to do so should not deprive him of his right at least to have the foreclosure re-opened. It was accordingly ordered that the plaintiff's suit should be dismissed unless he decided to have it treated as a foreclosure-suit.⁴ In connection with this case may be cited the English

1 *Palmer v. Hendrie*, 27 Beav., p. 351; *Fisher on Mortgages*, 4th ed., p. 309; and see *Walker v. Jones*, L. R., 1 P. C., 50.

2 *Fisher on Mortgages*, 4th ed., p. 1960; *Ladu v. Babaji*, I. L. R., 7 Bom., 533.

3 *Kali Prosonno v. Kamiri*, I. L. R., 4 Cal., 475.

4 *Bapuravi v. Ramji*, I. L. R., 11 Bom., 112; see *Ballam v. Amar*, 1 L. R., 12 All., 537, a case where the plaintiff had bought under his decree for sale and *Fisher on Mortgages*, 4th ed., p. 958.

case of *Palmer v. Hendrie*, where the transferee of the equity of redemption and the mortgagee joined in a partial alienation of the property, the purchase-money being received by the transferee alone, and the mortgagee afterwards sued the mortgagor upon his covenant. It was held that the mortgagee, having on the sale of the property allowed the money to be paid to the transferee and thus put it out of his own power to restore the mortgaged property, could not maintain his suit against the mortgagor.¹

It follows from this clause that where the security is sufficient, a decree for sale is the most advantageous to the creditor: since after obtaining that decree he may still have his personal remedy against the debtor.²

88. In a suit for sale, if the plaintiff succeeds, the [1]

Decree for sale.

Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds and [2]

Power to decree
sale in foreclosure-
suit.

the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court to meet the expenses of sale and to secure the performance of the terms.

¹ 27 Beav., 349; 28 Beav., 341; see *Kinnaird v. Trollope*, 39 Ch. D., 686.

² See note to section 89.

Commentary...

Note 1. Only the English mortgagee, the simple mortgagee, and the holder of a charge (section 100) can, as far as the Act provides, sue for sale,¹ and for the simple mortgagee no other remedy is available. The provisions of section 4 of Act VII of 1889 requiring of the representative of a deceased mortgagee a certificate, letters of administration, or probate, do not, it seems, apply to a suit in which a decree for sale, and no personal remedy, is demanded.² When a decree had been made under this section for the sale of the mortgaged property "in two months "if the sum due is not paid," and an application for its execution was made before the expiration of that time, the High Court at Allahabad rejected it as premature.³ If the decree for sale is properly framed it is unnecessary for the mortgagee to apply for attachment of the property.⁴

Neither in this section nor in section 86 is there any provision for an order for payment enforceable against the mortgagor personally. In order to make the decree complete there ought to be such an order, either for payment of the whole sum found to be due or for the balance remaining due after taking into account the proceeds of the sale. Such a form of decree is prescribed by the rules of the High Court of Bengal.⁵ But if the order for payment of the balance is omitted, application may still be made under section 90. It is clear that the mortgagee cannot reserve his personal remedy for another suit.

Note 2. The second paragraph of this section is borrowed from the Conveyancing Act, 1881, and can only apply to English mortgages. In England foreclosure rather than sale is the rule, and, while the Court has statutory power "in any action, whether for foreclosure or for redemption, "or for sale or for the raising or paying in any manner of mortgage-money," to direct a sale, it will not do so as a matter of course.⁶ Here, on the contrary, it will be observed that the decree for sale is of course in a suit for sale; while in a suit for foreclosure it is discretionary and

1 As to equitable mortgagees, see *ante* p. 204; as to usufructuary mortgagees, see *ante* p. 235.

2 Baid Nath v. Shamanand, I. L. R., 22 Cal., 143; Subramania v. Rakka, I. L. R., 20 Mad., 232; *contra*, Fateh Chand v. Muhammad Baksh, I. L. R., 16 All., 259.

3 Har Dayal v. Chadami Lal, I. L. R., 5 All., 194.

4 Dayachand v. Hemchand, I. L. R., 4 Bom., p. 520; Vencatanarasamma v. Ramiah, I. L. R., 2 Mad., 112.

5 Rule 12 printed in App. II. emitted in Madras Rules, and Batak v. Pitambar, I. L. R., 13 All., p. 361; see however Musaheb v. Inayat-ul-lab, I. L. R., 14 All., 513.

6 44 & 45 Vic., c. 41, section 25.

will take the place of a decree for foreclosure.¹ It would seem that under the present Act a suit for sale is intended to be brought only by a person interested as mortgagee and not, as is provided by the Conveyancing Act, 1881, by a person interested in the right of redemption, although an order for sale on default may form part of a redemption-decree made under section 92. The Court will direct a sale in cases where the ordinary decree cannot conveniently be worked out or where delay or expense may thus be saved, but not if from the nature of the property it were likely to cause injury to the mortgagor or other persons interested. It may be presumed that in dealing with English mortgages at any rate, the Court will be guided by the rules laid down in English cases.² The following are the most important instances in which English Courts have thought fit to order a sale under the corresponding section of the statute above referred to. A decree for successive redemptions and foreclosures having been obtained in an action by a second mortgagee against the first mortgagee and several successive incumbrancers, the second mortgagee redeemed the first and then applied for a sale; Jessel, M.R., granted the application, holding that he had jurisdiction to do so at any time before the suit was concluded by foreclosure absolute.³ In another case of an action for redemption, Fry J., ordered a sale on an interlocutory application of the plaintiff notwithstanding the opposition of the first and second mortgagees. The order provided that a reserved price should be fixed, large enough to cover what was due on the first and second mortgages, and that the plaintiff, to whom the conduct of the sale was given on the ground that he had the greatest interest, should give security for the costs of the sale. It was also ordered that the sale should take place out of Court, and that the proceeds should be paid into Court.⁴ And when in a foreclosure-action the mortgagor not being present, the plaintiffs asked for a sale, the same learned Judge said:—

“I think the proper order will be to direct an account to be taken of what is due to the plaintiffs on their security, and then that on this amount being certified, the property or so much of it as will be sufficient to satisfy the amount found due to the plaintiffs be sold.”⁵

As to the form of the decree, compare No. 128, Schedule IV to Civil Procedure Code.

1 This was so under 15 & 16 Vic., c. 86, section 48; *Heath v. Crealock*, L. R., 10 Ch., p. 32.

2 *Fisher on Mortgages*, 4th ed., pp. 478 and 4978.

3 *Union Bank of London v. Ingram*, 20 Ch. D., 463.

4 *Woolley v. Colman*, 21 Ch. D., 163; see *Davies v. Wright* 32 Ch. D., 220; *Brewer v. Square*, [1892] 2 Ch., 111.

5 *Wade v. Wilson*, 22 Ch. D., p. 236.

89. If in any case under section eighty-eight the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight; and thereupon the defendant's right to redeem and the security shall both be extinguished.

Procedure
defendant
amount due.

when
pays

Order absolute for
sale.

Commentary.

This section prescribes the procedure to be adopted in the case of a decree for sale, as section 87 does in the case of foreclosure-decrees. In either case on payment being duly made the mortgagor is, if necessary, to be put in possession of the mortgaged property; similarly in the like event in the case of a decree for redemption under section 93. In the contrary event either party may apply in execution of the decree for an order absolute for sale of the property, and until that order is made the decree cannot be executed and the right of redemption is not extinguished.¹ Consistently with this view the Calcutta High Court has held that the application for an order absolute is not an application under the Code of Civil Procedure and therefore need not be in the form prescribed by section 235,² and is not governed by article 178, schedule ii, of the Limitation Act.³ It has been further held by the same Court that applications relating to the order absolute are not questions relating to the execution of a decree within the meaning of section 244 of the Code.⁴ On the other hand in Allahabad it is considered that the application for an order under section 89 is governed by the abovementioned article of the

¹ *Tara Prosad v. Bhobodeb*, I. L. R., 22 Cal., 931.

² *Ajndhia-Pershad v. Baldeo*, I. L. R., 21 Cal., 818.

³ *Tilnuck Singh v. Parsotein*, I. L. R., 22 Cal., 924.

⁴ *Akikunissa v. Roop Lal*, I. L. R., 25 Cal., 133.

Limitation Act,¹ and that the order itself is like any order made in execution appealable.² In Calcutta it has also been held that the provisions made in the Code of Civil Procedure with reference to the sale of immoveable property, and particularly section 310A, do not apply to sales of mortgaged property under this Act.³ With regard to that particular section and section 291 the contrary opinion has been expressed in Allahabad,⁴ and in Madras.⁵ But in neither of these Courts does the point seem to have been actually decided. It is to be observed that in this section there is no proviso such as is found in sections 87 and 93 enabling the Court to enlarge the time fixed by the decree. The absence of this proviso favours the idea that the matter was left to be dealt with by the provisions of the Code of Civil Procedure.

No application for attachment is necessary inasmuch as the order for sale is in itself a sufficient authority for the sale.⁶ The decree-holder cannot, without the express leave of the Court, which leave moreover ought not to be granted as a matter of course,⁷ bid for or purchase the property. Where the mortgagee has upon leave being duly given purchased the property, he is bound to give credit for the actual amount of his bid only and may still execute his decree for the balance of the amount decreed. "The leave to bid puts an end to the inability of the mortgagee and puts him in the position of an independent purchaser."⁸ He cannot therefore be regarded as a trustee for the mortgagor, and provided he has acted in good faith and with due care he is not responsible for the disadvantageous result of the sale. If loss is occasioned by any misdescription of the property, the remedy of the

¹ Chunni Lal v. Harnem Das, I. L. R., 20 All., 302, overruling Rambir v. Drigpal, I. L. R., 16 All., 23.

² Oudh Behari v. Nageshar, I. L. R., 13 All., 278; Rajkumar v. Bishesar, I. L. R., 16 All., 271.

³ Kedar Nath v. Kali Churn, I. L. R., 25 Cal., 703.

⁴ Raja Ram v. Chunni Lal, I. L. R., 19 All., 205; Kashi Prasad v. Sheo Sahai, ib., 186; Harjas Rai v. Rameshar, I. L. R., 20 All., 354, as to sections 5, 206 and 210 of the Code.

⁵ Vallabha v. Vedapuratti, I. L. R., 19 Mad., 40.

⁶ Dayachand v. Hemchand, I. L. R., 4 Bom., p. 520; Vencatanarasamma v. Ramiah, I. L. R., 2 Mad., p. 112.

⁷ Code of Civil Procedure, section 294; Sheonath v. Janki, I. L. R., 16 Cal., 132; Fisher on Mortgages, 4th ed., 981. In the absence of leave the sale may be set aside; see Rukhinee v. Brojonath, I. L. R., 5 Cal., 308.

⁸ Mahabir v. Macnaghten, I. L. R., 16 Cal., 682, 692; Sheonath v. Janki, ib., 132; Gunga Pershad v. Jawahir, I. L. R., 19 Cal., 4, followed in Muhammad Husen v. Dharan Singh, I. L. R., 18 All., 31; see Krishnasami v. Janakiammal I. L. R., 18 Mad., 155; Warner v. Jacob, 20 Ch. D., 220.

mortgagor or other person interested in it is to have the sale set aside under section 311 of the Code.

As between rival decree-holders, claiming distribution under section 295 of the Code, it has been held that when the mortgagee has himself purchased the property under his decree he cannot proceed against other property of the judgment-debtor to the prejudice of other creditors without showing that the mortgaged property has realized a fair price.¹

This section does not declare, as does section 87, that on the passing of any order under it the mortgage-debt shall be deemed to be discharged. Other remedies therefore which the creditor may have he still retains, and he may pursue them against the mortgagor if the proceeds of the sale prove insufficient. Nevertheless in a case where the creditor, holding two mortgages of the same property, had bought it in execution of his decree on one mortgage, it was held that he could not execute his second decree by sale of other property of the debtor.² For this decision *Bapuraji v. Ramji*³ is cited as an authority, but it is not noticed that in that case the first decree was a foreclosure-decree, and that the value of the property sold exceeded the amount of the two decrees.⁴ In a recent Allahabad case it was held by a Full Bench that the fact of the mortgagee buying a part of the mortgaged property does not necessarily extinguish the mortgage. It depends upon the price paid by him and the value of the property whether the purchase has that effect, for the mortgagee buying has to bring into account the value of the property which he buys and therefore the result may be that the whole debt is discharged.⁵

90. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

Recovery of
balance due on mort-
gage.

Commentary.

According to the form (No. 109) given in the Code the plaintiff ought to ask for a personal decree in case of the proceeds realized by sale proving insufficient. But the form of decree (No. 128) follows closely

¹ *Hart v. Tara Prasanna*, I. L. R., 11 Cal., 718, explained in *Sheonath v. Janki*, I. L. R., 16 Cal., p. 136.

² *Ballam v. Amar*, I. L. R., 12 All., 537.

³ I. L. R., 11 Bom., 112, cited above, p. 314.

⁴ *Chunna Lal v. Anandi Lal*, I. L. R., 19 All., 197.

⁵ *Nand Kishore v. Raja Hariroj*, I. L. R., 20 All., 23.

section 88 of the Act and does not give that relief. Nevertheless in the Rules made under the Act by the High Courts of Bengal and Madras the omission is repaired and there can be no doubt that ordinarily a decree for sale does contain an order to pay the deficiency.¹ It has been held in Calcutta that under this section the holder of a decree, which simply directs the sale of the mortgaged property and contains no other direction for payment of the money, may on the proceeds proving insufficient apply for a decree to enable him to realize the balance out of other property of the debtor.² In other words a decree, which is incomplete, by reason of its containing no order for payment which can be enforced against the debtor personally, may be supplemented by an order under this section. It is clearly not intended that a second suit should be brought for the balance; nor can an order under the section be required in cases where the mortgagor is by the terms of the original decree made personally liable for the mortgage-money or for the balance remaining due after a sale has taken place.³

It has been doubted whether the amount due for the time being includes costs. If however section 86, paragraph 1, *Costs.* section 92, paragraph 1, and section 94 are read together, it would seem that the term is intended to include costs awarded by the decree. From the terms of section 86 and section 92, it is evident that the amount declared by the decree to be due, including such costs as may have been awarded, is for the purposes of those sections to be treated as the amount due on the mortgage. Costs that may be incurred subsequently to the decree are likewise treated on that footing, for under section 94 they, like moneys expended under section 72, are to be added to the mortgage-money, that is, to the amount declared due by the decree. It cannot be intended that costs incurred after decree shall be held part of the mortgage-money, while costs awarded by the decree are otherwise treated. Costs provided for in a foreclosure-decree may on default being made by the judgment-debtor be recovered from him personally, for his liability is not discharged by the decree absolute.*

1 See *Hart v. Tara Prasanna*, I. L. R., 11 Cal., 718, 729 and *Fazil Howladar v. Krishna Bundhoo*, I. L. R., 25 Cal., 580, as to nature of decree in regard to sections 230 and 295 of Civil Procedure Code.

2 *Sonatan Shah v. Ali Nuwaz*, I. L. R., 16 Cal., 423; *Lalla Tirhini v. Lalla Hurrak*, I. L. R., 21 Cal., 26.

3 *Durga Dai v. Bhagwat*, I. L. R., 13 All., 356; *Batak v. Pitambar*, *ib.*, 360, *Lalji v. Barbu*, I. L. R., 15 All., 334; *Sheo Charan v. Lalji Mal*, I. L. R., 18 All., 371.

4 *Rutnessur Soin v. Jusoda*, I. L. R., 14 Cal., 185; *Damodar Das v. Budh Kuar*, I. L. R., 10 All., 179; see generally as to costs *ante* p. 308 and note to section 94

The balance is legally recoverable otherwise than out of the property sold, when the mortgagor has made himself personally liable for the money and the mortgagee is not debarred from suing for it. For instance, where, as in the case cited in note 1 to section 68,¹ the intention of the parties is that the money should be repaid only out of the hypothecated property, a decree for the balance cannot be obtained; nor, it is apprehended, can such decree be passed if the mortgage contains no promise to pay, for in this country a mortgage does not necessarily import a personal liability.² On this latter point however there is authority to the contrary in Allahabad.³ The balance would not be *legally* recoverable, if the personal remedy were barred by limitation, that is to say, if the suit were brought after the expiration of six years.⁴

Redemption.

91. Besides the mortgagor, any of the following per-

Who may sue for
redemption.

sons may redeem, or institute a suit for redemption of, the mortgaged property :—

[1] (a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property ;

(b) any person having any interest in, or charge upon, the right to redeem the property ;

[2] (c) any surety for the payment of the mortgage-debt or any part thereof ;

[3] (d) the guardian of the property of a minor mortgagor on behalf of such minor ;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot ;

[4] (f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property ;

¹ *Bunseedhur v. Sujaat*, I. L. R., 16 Cal., 540.

² See note 1 to section 68.

³ *Musahib v. Inayat-ul-Jah*, I. L. R., 14 All., 513.

⁴ *Miller v. Runga Nuth*, I. L. R., 12 Cal., 389, following *Ram Din v. Kalka*, I. L. R., 12 All., 12; s.c., I. L. R., 7 All., 502; but see *Lallubhai v. Naran*, I. L. R., 6 Bom., 719.

(g) a creditor of the mortgagor who has, in a suit for [5] the administration of his estate, obtained a decree for sale of the mortgaged property.

Commentary.

Note 1. (a) and (b) Any person interested in the equity of redemption may redeem; it is not necessary in the suit for redemption to determine who are the other persons interested, but such other persons if ascertained should be joined as parties; and otherwise, the decree should be made subject to their rights.¹ The mortgagor and any persons claiming through him either by voluntary or by involuntary alienation, whether of the whole or any part of the property, may redeem.² Thus the purchaser of part of the property may redeem, subject to the provisions of the last paragraph of section 60,³ as also a lessee under a lease made subsequently to the mortgage,⁴ and a second,⁵ or a derivative mortgagee. Although the plaintiff must show a title to redeem, his suit should not be dismissed because his title is incomplete at the date of filing the suit, *e.g.*, because being a purchaser in execution of a decree he has not obtained a certificate.⁶ As to the case of redemption by one of several co-mortgagors, see section 95.

Note 2. (c) A surety is entitled to redeem by virtue of his right to avail himself of all the creditor's securities.⁷ Unless however he has

1 *Pearce v. Morris*, L. R., 5 Ch., 227; *Tarn v. Turner*, 39 Ch. D., p. 461; *Kinnaird v. Trollope* 39 Ch. D., 636; *Hall v. Howard*, 32 Ch. D., 430; *Konna Panikar v. Karunakara*, I. L. R., 16 Mad., 328; *Norender Narain v. Dwarka Lal*, I. L. R., 3 Cal., p. 408; s.c., L. R., 5 I. A., 18; and see section 85.

2 The Law Commissioners at this section refer to *Kishen Bullabh Mulla v. Belasoo Cunnur*, 3 W. R., 230; *Bissonath Sing v. Brojonath Doss*, 6 W. R., 230, and *Lalla Doorga Pershad v. Lalla Luchmun Sahoy*, 17 W. R., 272. See also *Nadyar v. Roop Dass*, 22 W. R., 475, and *Dhondo v. Balkrishna*, I. L. R., 8 Bom., 190; *Subbaraya v. Venkataratnam*, I. L. R., 15 Mad., 234; *Nainappa v. Chidambaram*, I. L. R., 21 Mad., 18.

3 See cases cited in note 4 to section 60; *Ganga Gobind v. Bani*, 3 Beng. L. R., 172; and see *Periandi v. Angappa*, I. L. R., 7 Mad., 423.

4 *Radha Pershad v. Monohur*, I. L. R., 6 Cal., 317; *Kasimunnissa v. Nilratna*, I. L. R., 8 Cal., 79; and see *Fisher on Mortgages*, 4th ed., p. 717, citing *Koech v. Hall*, 1 Smith's L. C., 9th ed., p. 546; *Tarn v. Turner*, 39 Ch. D., 456; *Paya Matathil v. Kovaniel*, I. L. R., 19 Mad., 152.

5 *Radhabai v. Shamray*, I. L. R., 8 Bom., 168; *Teeyan v. Smith*, 20 Ch. D., 724.

6 *Krishnaji v. Ganesh Bapuji*, I. L. R., 6 Bom., 139; *Pearce v. Morris*, L. R., 5 Ch., 227.

7 See *Contract Act*, sections 140, 111, and *Fisher on Mortgages*, 4th ed., p. 945.

paid the debt or part of it, he is not in English law a necessary party to a suit for foreclosure.¹

Note 3. (*d*) Where there are a widow and minor son, under Hindu law the son must be represented in the suit, and he is not bound by a decree obtained against his mother only in disregard of his rights in the estate.²

Note 4. (*f*) This clause introduces a novelty, for it has been held that a judgment-creditor who has attached, is not as such entitled to redeem a mortgage existing prior to his attachment.³ In England judgment-creditors who have acquired an interest by issuing execution may redeem, but until they have done so they are not necessary parties to a foreclosure-suit and are not entitled to redeem.⁴

Note 5. (*g*) In this clause the English rule is followed.⁵ To the list given in the section, of persons entitled to redeem, might be added the Crown, in cases where the right of redemption has escheated, and the Official Assignee under the insolvency law.

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering—

Decree in redemption-suit.

- [1] that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of this suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;
- [2] that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage

¹ *Gedye v. Matson*, 25 Beav., 310.

² *Akoba v. Sukharam*, 1. L. R., 9 Bom., 429; *Jatha Naik v. Venktapa*, 1. L. R., 5 Bom., 14.

³ *Soobhul v. Nitýe*, 1. L. R., 6 Cal., 663.

⁴ *Cork v. Russell*, 1. L. R., 13 Eq., 810; *Fisher on Mortgages*, 4th ed., p. 717.

⁵ *Ib.*; *Christian v. Field*, 2 Harc. 177.

and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; and

that if such payment is not made on or before the day [3] to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

Commentary

Note 1. This section dealing with redemption, corresponds generally with section 86 relating to foreclosure.¹ Where foreclosure is possible there can always be redemption; but a suit for foreclosure is not possible in all cases where there may be redemption. The alternative, which the decree under this section gives to the mortgagor in cases where foreclosure is inadmissible and the mortgage is not a mortgage by conditional sale, is that the property should be sold. It is of course necessary for accounts to be taken in a suit for redemption, in order that it may be ascertained whether or not the mortgage has been paid off.² And though the language of this paragraph is not identical with that of section 86, relating to foreclosure-decrees, no doubt the accounts to be taken under the two decrees are the same. For mesne profits accruing due after the institution of a redemption-suit, the mortgagor who has obtained a decree for the redemption and possession of the mortgaged property, may sue in a separate suit.³ Here as under section 86 it is the mortgagor who ordinarily has to pay costs.⁴

Note 2. Provision is made as in section 60 and section 86 for three steps being taken by the mortgagee, but curiously the language used in the three sections is not identical. (a) The mortgagee is to deliver up not only the mortgage-deed, if any, but also "all documents in the mortgagee's possession or power relating to the mortgaged property."

¹ For form of plaint in redemption-suit, see Code of Civil Procedure, Schedule IV, No. 110.

² See *Muthra Dass v. Magh Singh*, 2 N. W. P., 207.

³ Civil Procedure Code, section 244; *Hunoo Doss v. Maharani Surmt, J. R.*, 9 I. A., 1; *Baboo Gour Kishen v. Sahay Eukeer*, 7 W. R., 364; for limitation see Art. 105, Schedule II to Limitation Act.

⁴ See note to section 86, see *ante* p. 308 and section 94.

(b) The mortgagee is to re-transfer the property to the plaintiff "free from the mortgage and all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims;" and (c) he is, if in possession of the property, to deliver up possession to the plaintiff. The re-transfer is appropriate to the case of an English mortgage, and not to that of a simple mortgage, which involves no transfer of ownership to the mortgagee. By a re-transfer free from incumbrances is meant a conveyance with a covenant that the mortgagee has done no act to encumber the property. According to the form of re-conveyance given in the Conveyancing and Law of Property Act, 1881, the mortgagee conveys "all the lands, etc., vested in C under the said indenture to hold to and to the use of B in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture." This language expresses with sufficient clearness what the mortgagor really requires. In the case of a simple mortgage the usual course is for the mortgagor to content himself with getting back his mortgage-deed and any other title-deeds he may have handed over. The more prudent course would be to obtain as provided in section 60 an acknowledgment in writing registered to the effect that all rights in derogation of his interest vested in the mortgagee have been extinguished.

Note 3. As has been already pointed out, the Court has power under this Act to order a sale in a suit for foreclosure, and it must do so if a suit for sale is brought by a mortgagee who shows himself entitled to a decree. It is further provided in section 93, paragraph (2), that the defendant, except in cases of a mortgage by conditional sale or an usufructuary mortgage, can on default being made in payment demand a sale. But it does not appear that the plaintiff in such proceedings has a right to insist on a sale. If it were intended that he should have it, for instance in the case of an English mortgage, it may be presumed that the right would have been enumerated among the other rights of a mortgagor in section 60, or expressly given by section 88. In England "any person entitled to redeem mortgaged property may have a judgment or order for sale, instead of for redemption, in an action brought by him, either for redemption alone or for sale alone, or for sale or redemption in the alternative."¹ Although the terms of the present paragraph, especially when read with section 67, proviso (a), and the second paragraph of section 93, seem to require that in the case of an usufructuary mortgage an order for sale on default should be made, it is difficult to understand why, if it be correct to hold that an usufructuary

1 44 & 45 Vic., c. 41, section 25 (1); see *Brewer v. Squire*, [1892] 2 Ch., 111.

mortgagee may not sue for sale,¹ such order should be made in a decree in a redemption-suit. Provided that the mortgagee is in possession and that the mortgage is simply usufructuary and not of a mixed class, it is difficult to see why a mode of realising his debt, for which the creditor never bargained, should be accorded to him. If it is suggested that the order for sale may serve to protect the rights of the mortgagor, who possibly may not be in a position to liquidate the mortgage-debt, it may be answered that, if the equity of redemption has any value, that value can be realised equally well by a sale effected privately by the mortgagor. On the other hand, if the property is mortgaged to its full value, or nearly so, the mortgagee may run the risk of finding that the proceeds of the forced sale are insufficient to satisfy his claim. In English practice, except where the Court exercises its optional power under the Conveyancing Act, 1881, to direct a sale on the application of any party interested, the concluding direction of the decree in a redemption-suit is that on default made by the mortgagor the suit shall stand dismissed; and that, it is submitted, is the direction which properly meets the requirements of the case. In the absence of such direction and of an order for sale, the mortgagor is, at least according to the Madras Court, at liberty to bring a fresh suit for redemption.² English mortgages in the mofussil, not being made between Europeans, have been treated as mortgages by conditional sale, and therefore in Bengal as enforceable only under the conditions imposed by the Regulation of 1806.³

In Madras, there being no corresponding Regulation, a decree for sale similar to that granted in *Manly v. Patterson* has been the relief usually granted.⁴ As to the power of sale without the intervention of a Court generally given in English mortgages, see section 69.

The time allowed for the parties to conform to the decree may be enlarged on cause shown under section 93.⁵

93. If payment is made of such amount and of such [1] subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

1 As to this, see note 1 to section 67.

2 See cases cited in note 2 to section 60.

3 Shurnomoyee v. Srinath Das, I. L. R., 12 Cal., 614; Thumbusamy v. Hoosain, I. L. R., 1 Mad., 1.

4 I. L. R., 7 Cal., p. 401.

5 See also section 87.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished.

- [2] Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section ninety-two for payment to the defendant.

Power to enlarge
time.

Commentary.

Note 1. This section corresponds generally with section 87. It will be observed that on the plaintiff's failure to obey the order made under section 92, it rests with the defendant to decide whether in cases where foreclosure is possible, the Court shall make the order for foreclosure described in the third paragraph of the section, or, in cases where the mortgage is not by conditional sale, the order for sale described in the fourth paragraph. In cases where either order is admissible, the

Court does not appear to have the discretion which it has when, 'a person interested in the mortgage-money or the equity of redemption' applies for an order for sale under the second paragraph of section 88. What course the Court should pursue when there are more defendants than one and applications are made in opposite senses, is neither prescribed by the Act nor indicated by any decision upon it.

As to the effect of the order absolute for foreclosure or sale see notes to sections 87 and 89.

If the decree contains no order for foreclosure on default of payment, it is a question whether the omission has the effect of giving the mortgagor a longer time than he could have under section 92, that is, whether the money may be paid into Court and the decree executed at any time within the period allowed by the law of limitation.¹

Note 2. According to the English cases the indulgence allowed by the proviso is not generally granted in redemption-suits, because the mortgagor has come into Court professing to have his money ready, whereas in a foreclosure-suit he is compelled to redeem.² This distinction at any rate affords a reason why the indulgence should be less readily granted in favor of mortgagors who have sued to redeem. In a Madras case, where on the defendant applying to execute the decree made in a redemption-suit, the plaintiff asked for further time, the Court held that this proviso was not applicable, inasmuch as no application for foreclosure had been made by the defendant and the decree did not contain the clause prescribed in the last paragraph of section 92.³ In a similar case the Bombay High Court expressed a doubt whether the proviso was intended to apply to a case where application was being made for execution of the decree and the day fixed for redemption had already passed.⁴ But in a more recent case that Court held that an order extending the time for redemption might for just cause be made at any time before a decree absolute under section 93 was passed.⁵

94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale, by the Court under this chapter, the Court shall, unless the conduct of the

Costs of mortgagee subsequent to decree.

¹ *Jai Kishu v. Bhole*, I. L. R., 14 All., 529, overruling *Bandhu v. Shah Muhammad*, I. L. R., 14 All., 350; *contra*, *Narayan v. Anandram*, I. L. R., 16 Bom., 480.

² *Fisher on Mortgages*, 4th ed., p. 953.

³ *Elayadath v. Krishna*, I. L. R., 13 Mad., 267; see as to effect of proviso and cases thereon note 2 to section 87.

⁴ *Ishwargar v. Chudasama*, I. L. R., 13 Bom., 109, followed in *Patloji v. Ganu*, I. L. R., 15 Bom., 371; *Subhann v. Krishna*, ib., 644.

⁵ *Nandram v. Babaji*, I. L. R., 22 Bom., 771.

mortgagee has been such as to discontinue him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Commentary.

This section relates only to costs incurred by the mortgagee after decree. Other costs of the suit may or may not be added to the amount found due to the mortgagee on the account taken under the provisions of section 86 or section 88 or section 92.¹ By mistake, as it would seem, reference to a foreclosure-suit is omitted in the first part of the section. Under section 87 costs incurred after decree in such a suit may be added to the amount due under the decree, and section 89 has similar language with regard to the decree in a suit for sale, and section 93 with regard to the decree in a redemption-suit. The costs in question must be the costs of carrying out the directions of the decree as stated in the second paragraph of section 86, *e.g.*, the costs of a re-conveyance, &c. Where a decree was made in the terms of section 87 for payment of the mortgage-money and a sum named on account of costs or in default for foreclosure and delivery of possession to the mortgagee, and on default being made the decree-holder applied for execution of the decree as to costs, the High Court of Bengal held that *quoad* costs the decree could be executed against the defendant personally. The Court had under section 220 of the Civil Procedure Code power to make such an order as to costs and it was not intended that the liability for costs should be discharged by the decree absolute for possession of the property.²

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Commentary.

Whenever several persons are jointly liable in one obligation the general rule is that there should be an equal distribution of the burden among them. Any one of them having discharged the whole debt may

¹ See generally as to costs note to section 86, *ante* p. 308.

² *Rutnassur Sein v. Jusoda*, 1, L. R., 14 Cal., 185; *Damodar Das v. Budh Kuar*, I. L. R., 10 All., 179.

call on each of the others to contribute his share. He is entitled to recover the amount paid by him in excess of his own share as a debt under section 69 of the Contract Act.¹

If one of several mortgagors pays off the entire debt and redeems the property, he holds their shares in the property as security for the amount which he has paid in excess of his own proportionate share of the mortgage-debt.² The mortgagee is bound to convey on tender by one having a partial interest, but the conveyance should reserve the equities of the others interested.³ In effect the co-mortgagor or other person standing in his position who has paid the debt assumes the position of mortgagee with reference to his co-mortgagors, and may accordingly recover the money by suit or be redeemed by them.⁴ Thus where one of two fields mortgaged by Babaji to Jairam passed by sale to Ramji, and subsequently on the mortgage being redeemed by Babaji a fresh mortgage was executed by him in the defendant's favour, it was held that the plaintiff, a purchaser from Ramji, could not recover possession from the defendant, except on paying such sum as represented Ramji's proper share of what had been paid to Jairam to free the property of which Ramji was part owner.⁵ In the suit which may be brought by a mortgagor against his co-mortgagor who has paid off the mortgage-money, time runs as it would if the original mortgagee were defendant, article 148 of the schedule to the Act being applicable.⁶ In other words it is not a new incumbrance which comes into existence on the payment of the mortgage-money, but the original mortgage right is, in so far as it affects the interest of parties other than the one who has made the payment, vested in that person.

The section which is apparently founded on a passage in *Macpherson on Mortgages*⁷ provides only for the case of a co-mortgagor who has obtained possession after paying off the mortgage. The language of it is peculiar, for the term 'expenses' is not generally used to denote

1 *Mothooranath v. Kristo Kumar*, 1 L.R., 4 Cal., 369; *Ram Kristo v. Mussamut Amceeroonissa*, 7 W. R., 314; *Norender Narain v. Dwarka Lal*, 1 L. R., 3 Cal., p. 408.

2 *Asansab v. Vamana*, 1 L. R., 2 Mad., 223.

3 *Nainappa v. Chidambaram*, 1 L. R., 21 Mad. 26; see for form of decree *Pearce v. Morris*, L. R., 5 Ch., 227.

4 *Pancham Singh v. Ali Ahmad*, 1 L. R., 4 All., 58; *Chedi Lal v. Bhagwan*, 1 L. R., 11 All., 234; *Nura Bibi v. Jagatuarain*, 1 L. R., 8 All., 295; see *Moidin v. Oothumanganni*, 1 L. R., 11 Mad., p. 418.

5 *Vithal v. Vishvasrav*, 1 L. R., 8 Bom., 497.

6 *Ashfaq v. Wazir Ali*, 1 L. R., 11 All., 423, also reported in 1 L. R., 14 All., 1; *Ram Sing v. Baldeo*, 1 L. R., 8 All., 250.

7 Edition of 1877, p. 145.

mortgage-money. The case provided for is not the only one in which in consequence of payment made to an incumbrancer a person becomes entitled to the benefit of the incumbrance. Section 101 presupposes the possibility of keeping alive an incumbrance. The case of a tenant-for-life who pays off a charge on the inheritance is an instance.¹ Section 74 provides in effect that the second mortgagee shall be treated as the transferee of the first mortgage which he has paid off, and section 91 shows that any person having an interest in the property may sue to redeem. The decree which any such person obtains is made subject to the equity of redemption vested in any other person.²

Where the debt is not entire but has been severed either by the original intention or the subsequent conduct of the persons concerned, one of several co-mortgagors can redeem his own share only, in which case he has of course no charge on the shares of the others.³

The mode in which the proportion payable by any mortgagor should be determined, in the case where several properties are comprised in one mortgage, is declared in section 82.

Sale of Property subject to Prior Mortgage.

96. If any property the sale of which is directed under this chapter, is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property
subject to prior
mortgage.

Commentary.

The power of the Court under this section is not to affect those which it possesses under section 57.⁴ The prior mortgagee must be before the Court in accordance with the provisions of section 85, and since he has a better right to the land than the subsequent mortgagee or the mortgagor, the Court will not change the nature of his security in the manner here described without his consent. It may be otherwise in

¹ Adams v. Angell, 5 Ch. D., p. 645: see note to section 101.

² See note 1 to section 91.

³ See cases cited in note 4 to section 60.

⁴ See last paragraph of section 97, and section 57.

cases where an application is made by a party to the sale of incumbered property under the provisions of section 57. The Code of Civil Procedure gives to the Court a similar power to that contained in this section when any property is liable to be sold in execution of a decree,¹ and by the same section provides that where any property is sold subject to a "mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale." From the language of this and the following section, it may fairly be inferred that property may be sold under a decree subject to a prior mortgage; for if with the consent of the prior mortgagee it may be sold free from his mortgage, surely without his consent it may be sold subject to his mortgage. Nevertheless it has been held otherwise by a Full Bench of the Allahabad High Court.²

97. Such proceeds shall be brought into Court and applied as follows;—first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interest therein or upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

¹ Act XIV of 1882, section 295, proviso (b).

² *Mata Din v. Kazim*, I. L. R., 13 All., 432, *Mahmood*, J., diss.; see note to section 75 and cases there cited.

Commentary.

With this section may be compared the provisions of the Code of Civil Procedure for the distribution of the proceeds of a sale made in execution of a mortgage decree.¹ The present section secures the right of a mortgagee, having prior claims to those of the person in whose suit or on whose application the Court directs the sale under this chapter; while the Code secures those of the mortgagee to discharge whose incumbrance the decree ordering the sale has been passed. It may be observed that the section of the Code above referred to, is not to "affect any right of the Government"; while here there is no such saving clause.

The persons interested in the property sold, and therefore entitled to the residue, would include the mortgagee, or any subsequent mortgagees according to the priorities ascertained in the suit in which the order for sale was passed. And may also be held to include the persons provided for by section 295 of the Civil Procedure Code in the following clause:—

"The proceeds of the sale shall be applied, *fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof."

Anomalous Mortgages.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage, or a combination of the first and third or the second and third, of such forms, the right and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in section 58, clauses (b), (c), (d) and (e).

Commentary.

In illustration of the first combination mentioned in the section, namely, that of an usufructuary mortgage with a simple mortgage, reference may be made to a recent case where the instrument empowered the mortgagee to take possession on default being made by the mortgagor, and proceeded:—"Should on the expiration of the term of this instrument any money remain due, then till payment thereof possession will continue according to the terms herein set out. If I do not accept this; then as soon as the breach of promise occurs, they will

¹ Act XIV of 1882, section 295, proviso (c).

"at the end of the year realise the amount of the instalment by sale of the villages and other property belonging to me." It was contended that the mortgagee could not take possession except at the option of the mortgagor, and that if the mortgagor thought fit to object, the mortgagee could not insist on having possession, but must realise the amount by sale. The Judicial Committee held that the reasonable construction of the document was, that there was an absolute power to take possession on default in payment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the property to satisfy the debt.¹

According to Muttusami Ayyar, J., the Malabar *kanam* is a transaction which combines the ingredients of a simple and an usufructuary mortgage.² The terms of the document actually before him are not given in the report, but unless there is an express covenant to pay on the expiration of twelve years such transaction clearly does not import any power to have the property sold in satisfaction of the debt.

The other combination, namely, that of a mortgage by conditional sale with an usufructuary mortgage, is illustrated by the *kat-kabala*.³ A peculiar mortgage is that known as *peruartham* obtaining in parts of Malabar under which the proprietor, taking the full market value of the property, is entitled to redeem on payment of the actual value at the time of redemption and not of the amount advanced.⁴ Where an usufructuary mortgage was made for a term of years and there was no provision authorising the mortgagee to retain possession until payment of the mortgage-money, it was held that the section became applicable and the instrument was construed as giving the mortgagee the right to remain in possession on the same terms after the expiration of the term.⁵ This section has been recently applied to a case where in consideration of a loan of money possession of property was given for a term of three years and it was expressly provided that at the end of the term the borrower should be replaced in possession "without paying either the principal or the interest." It is conceived that this was really a usufructuary mortgage within the meaning of section 58 (d).⁶

1 Deputy Commissioner of Rae Bareilly v. Rampal Singh, I. L. R., 11 Cal., 237; see form in Phul Kuar v. Murli Dhar, I. L. R., 2 All., 528.

2 Ramunni v. Brahma, I. L. R., 15 Mad., p. 369; see Chathan v. Kunjan, I. L. R., 12 Mad., 109; Ramayya v. Guruva, I. L. R., 14 Mad., 232; and Motiram v. Vitai, I. L. R., 13 Bom., p. 94.

3 Ramasami Sastrigar v. Samiappanayakan, I. L. R., 4 Mad., p. 183; Girwar Singh v. Thakur Narain, I. L. R., 14 Cal., p. 737.

4 Shekari Varma Valia v. Mangalam Amngar, I. L. R., 1 Mad., 57.

5 Hikummatulla v. Imam Ali, I. L. R., 12 All., 203.

6 Visvalinga v. Palaniappa, I. L. R., 21 Mad., 1.

Attachment of Mortgaged Property.

99. Where a mortgagee, in execution of a decree ^{Attachment of} for the satisfaction of any claim, whether ^{mortgaged property.} arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

Commentary.

This section applies equally to persons having charges,¹ and to the holder of a usufructuary mortgage.² It is intended 'alike to prevent the mortgagee from suing his mortgagor personally and executing the money-decree so obtained against the mortgaged property, thereby depriving him of his right of redemption, and to put an end to the difficult questions which formerly arose in disputes between the purchaser at the sale in execution of a money-decree and incumbrancers holding mortgages subsequent to that held by the decree-holder or between one purchaser and another.'³ Under this provision a mortgagee although he is not prohibited from attaching the property,⁴ can bring it to sale only by means of a suit under section 67 and he may institute such suit although he has obtained a money-decree. It has been suggested in Calcutta that the suit to be brought may be based on the charge created by the attachment. But the language of the section seems too clear to leave any room for doubt.⁵ The section has been held to be applicable to mortgages executed before the Act came into force.⁶ In a recent case, which came on appeal before the High Court at Calcutta, it appeared that a mortgagee after a lapse of five years from the date of a decree, which had however been kept alive,

¹ *Ambhoyessury v. Gonri Sunkur*, I. L. R., 22 Cal., 859; *Matangini v. Chooney-money*, I. L. R., 22 Cal., 903.

² *Azim-ullah v. Najm-un-nissa*, I. L. R., 16 All., 415; *Vigneswara v. Bapayya*, I. L. R., 16 Mad., 436.

³ See Report of the Law Commissioners, p. 35, and Sir G. Evans' speech quoted in Stokes' Codes, Vol. I., p. 734.

⁴ *Chundra Nath v. Burroda*, I. L. R., 22 Cal., 813; see *Jogemaya v. Thackomoni*, I. L. R., 24 Cal., 473.

⁵ *Jadub Lall v. Madhub*, I. L. R., 21 Cal., 34, commented on in *Azim-ullah v. Najm-un-nissa*, I. L. R., 16 All., 415.

⁶ *Kaveri v. Ananthayya*, I. L. R., 10 Mad., 129.

sought to enforce it in April 1885, but was met with the objection that no suit has been instituted under section 67 as is required by the section. The Court overruled this objection saying:—

“It is contended before us that section 99 of the Transfer of Property Act applies to all decrees, whether they may be money-decrees or mortgage-decrees; and that in every case of the kind, if the decree was not obtained under section 67, the mortgaged property cannot be sold.”

“We are unable to accede to this argument. As we read section 99 it was never intended to apply to a decree already obtained declaring a lien over, and authorising sale of, the mortgaged property. It was evidently intended to apply to other decrees not being mortgage-decrees. But even if we were to concede that it was so, we are nevertheless of opinion that section 2 of the Act saves the right of the decree-holder in the present case to obtain a sale of the property hypothe- cated to him.”¹

An application for sale made in violation of the section ought to be dismissed and cannot be treated for the purpose of article 179 of the schedule to the Limitation Act as one made in accordance with law.² A sale, when once made and duly confirmed under the provisions of the Code, cannot however be said to be void and without effect for all purposes. As between the immediate parties it cannot be questioned in another suit, and where the buyer of a share of mortgaged property sued the other sharers for partition it was held that the latter could not resist the claim on the ground that the sale was an illegal one.³ In a recent Bombay case, where the mortgagee put up the property for sale in execution of a decree for one instalment without notifying his lien for other instalments which had yet to fall due, it was assumed that the buyer had a good title and it was further decided that, as he had bought without notice of the further charge, he held the property free and unincumbered in respect thereof.⁴ On the other hand, in cases in which the interests of third parties would be prejudicially affected by the sale it has been held to be ineffectual against them. Thus in two Madras cases in which the plaintiffs, being respectively the brother and sons of the mortgagor, were not parties to the decree obtained against him by the mortgagee, it was held that the sale did not pass their interest in the mortgaged property although the decree in each case was passed under such circumstances as to make it binding upon them.⁵ In a similar case it was held that the sons of the mortgagor were in a position to resist a

1 *Dinendra v. Chandra*, I. L. R., 12 Cal., p. 437.

2 *Chattar v. Newal Singh*, I. L. R., 12 All., 64.

3 *Tara Chand v. Imdad*, I. L. R., 18 All., 325.

4 *Ramchandra v. Jairam*, I. L. R., 22 Bom., 686.

5 *Sathuvayyan v. Muthusami*, I. L. R., 12 Mad., 325; *Vigneswara v. Bapayya*, I. L. R., 16 Mad., 437.

suit brought by the purchaser for possession of the property.¹ In Bombay it has also been held that the coparcener of a mortgagor against whom as manager of the family a decree for a debt binding on the family has been obtained is, notwithstanding the sale of the property, entitled to exercise his right of redemption.²

It may be convenient to refer shortly to the conflicting decisions prior to the passing of this Act. In a Full Bench case decided in 1875,³ it was held in Bengal that it made no difference whether the decree obtained by a mortgagee was a decree for sale or a mere money-decree, inasmuch as on the sale under a money-decree there would pass to the purchaser all that the mortgagee and mortgagor could convey, and therefore the mortgagee could not institute a second suit against the same defendant to bring the property to sale. The lien would not be extinguished, but would continue in existence so far as might be necessary for the protection of the purchaser. In 1876 in the same Court⁴ it was again held that a mortgagee, having procured the sale of the property in execution of his money-decree, could not afterwards sue the purchaser on his mortgage. The contention that the sale affected the equity of redemption only, was disallowed, nor was it admitted that the sale could be treated as if it were a sale upon a decree obtained by a person not a mortgagee:—

“We are of opinion,” it was said, “that a mortgagee is not entitled by means of a money-decree obtained on a collateral security, such as a bond or covenant, to obtain a sale of the equity of redemption separately, because by doing so he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a Court of equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate.”⁵

These two decisions were approved by the Bombay High Court in a case decided in 1879.⁶ The question there was whether the mortgagee, having obtained a money-decree and had the property sold in execution, could make a title on the strength of a second sale which followed on a second suit brought by him for sale of the property.

¹ *Durgayya v. Anantha*, I. L. R., 14 Mad., 74.

² *Martand v. Dhondo*, I. L. R., 22 Bom., 624.

³ *Syud Emam v. Rajcoomar*, 14 Beng. L. R., 408; *Muthora v. Chundermoney*, I. L. R., 4 Cal., 817; *Chunnilal v. Banaspat*, I. L. R., 9 All., 23.

⁴ *Bhaggobutty v. Shamachurn*, I. L. R., 1 Cal., 337.

⁵ *Ib.*, p. 353; see *Martand v. Dhondo*, I. L. R., 22 Bom., 627.

⁶ *Narsidas v. G. Joglekar*, I. L. R., 4 Bom., 57; *Ramu Naikan v. Subbaraya*, 7 Mad. H. C., 229, followed; *Sheshgiri v. Salvador*, I. L. R., 5 Bom., 5; *Abdulla v. Haji Abdulla*, *ib.*, p. 13.

It was held that although by converting his mortgage-debt into a judgment-debt he did not extinguish his lien, he could not enforce the lien in a second proceeding. The doctrine enunciated by the Allahabad Court that on a sale in execution of a money-decree nothing passes to the purchaser but the right, title and interest of the judgment-debtor, was noticed with disapproval. In the Allahabad case referred to the particular point decided was that the purchaser under similar circumstances took subject to incumbrances created prior to the sale, and so might be foreclosed by a second mortgagee.¹ In other words he could not avail himself of the first mortgage as a shield against subsequent incumbrancers.

Charges.

100. Where immoveable property of one person is by [1] act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections eighty-one and eighty-two and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a [2] trustee on the trust-property for expenses properly incurred in the execution of his trust.

Commentary.

Note 1. The question whether a charge or a mortgage has been created must be decided by reference to the definition of mortgage given in section 58, and it is from a simple mortgage more particularly that a charge has to be distinguished.² By a charge the creditor becomes entitled to have his claim satisfied out of particular property, but that property is not transferred to him.³ It is only in virtue of the decree for sale that

Charge or mortgage.

¹ Khub Chund v. Kahan, 1 L. R., 1 All., 240; see Vencatachella v. Panjanadion, 1 L. R., 4 Mad., 213, and other cases cited in note to section 101.

² Girwar Singh v. Thakur Narain, 1 L. R., 1 Cal., p. 738; and see ante p. 187.

³ Tancred v. Delagoa Bay Co., 23 Q. B. D., 239; Barlinson v. Hall, 12 Q. B. D., p. 350.

an interest passes to the person entitled.³ According to the English conception of mortgage, which is understood to involve a transfer of the legal estate in the land, the distinction between it and a charge is clear, but here under the Act a mortgage imports a transfer of an interest only in the property, and many transactions rank as mortgages which do not correspond to the definition of an English mortgage. Speaking of an instrument in the ordinary form of a simple mortgage, Holloway, J., observed:—"Strictly speaking, no doubt, the contract is not one of mortgage; it is however one of hypothecation."² Instances of such instruments are given in the note to section 58, and it will be seen that the Courts do not altogether agree in their mode of treating such instruments with reference to the provisions of that section. Apart from limitation, the question whether by a given instrument a mortgage or a charge is effected does not seem to be material with regard to the rights or remedies of the creditor. In either case he can by judicial process bring about a sale of the property for the satisfaction of his claim, and similarly in England the rights of the charge-holder and the mortgagee are by statute placed upon the same footing.³ The former, it is enacted, "may enforce a foreclosure or sale of the land charged in the same manner and under the same circumstances in and under which he might enforce the same, if the land had been conveyed to him by way of mortgage subject to a proviso for redemption on payment of the money secured at the appointed time." In Madras, although the Court has refused to treat as mortgages instruments which elsewhere have been so treated, it has notwithstanding been held that the creditor, having a charge only, has equal rights with the mortgagee against the property charged. His right is a real right which cannot be defeated by a sale to a third party.⁴ It has been held that a security made to take effect on the non-payment of money at a future date is not a charge within the meaning of this section.⁵

A charge by act of parties is also created when property is by contract, (*e.g.*, by a settlement,) will or other instrument given as security for the payment of money.⁶

Other charges by act of parties.

1 *Motiram v. Vitai*, I. L. R., 13 Bom., p. 100. In *Kishan Lal v. Ganga Ram*, I. L. R., 13 All., 28, the purchaser was necessarily bound by the decree for sale, although he had no notice of it.

2 *Chetti Gaundan v. Sundaram*, 2 Mad. H. O., p. 53; see *ante* p. 181.

3 38 & 39 Vic., c. 87, section 23.

4 See however *per* Mahmood, J., *Kishan Lal v. Ganga Ram*, I. L. R., 13 All., p. 46.

5 *Madho Misser v. Sidh Binaik*, I. L. R., 14 Cal., 687, cited *ante* p. 196.

6 *Fisher on Mortgages*, 4th ed., p. 108.

What is known as a *caredy* affords an instance.¹ A document running as follows:—"I have willingly and as a thanksgiving fixed an annual allowance of Rs. 1,000 in cash in perpetuity out of the profits of the said village for my eldest brother," was held to create a charge.² By his will a man may charge his debts on his property either by express words to that effect or by giving to his executors, being the devisees of his estate, a direction to pay his debts. As against a purchaser from the executor such a charge cannot be made good unless it is shown that he had notice of the debts and of the intention to defeat them.³ In a case, where the mortgagor of an estate had given to the mortgagee, subsequently to the date of the mortgage, two successive money-bonds, in each of which it was stipulated that if the amount were not paid on the due date, it should take priority over the amount due under the mortgage, and that the redemption of the mortgage should not be claimed until the bond had been satisfied, it was held that they did not create any further charge on the mortgage-premises, although they would prevent the original mortgagor from redeeming without paying their amount.⁴

Charges arise by operation of law to secure the payment of certain debts, or the discharge of liabilities of a like nature.

Charge by operation of law.

Thus under the Act a vendor has a charge on the property sold for his unpaid purchase-money;⁵ a mortgagee has a charge on the surplus proceeds of the sale of the mortgaged property sold for arrears of revenue;⁶ and where one of several mortgagors has redeemed the property, he has a charge on the shares of his co-mortgagors for the money expended in the redemption of their shares.⁷ Charges of this kind are classed in English books as equitable liens. Of the same kind is the right of a tenant-for-life who, in order to save the fund, pays calls on shares or makes other similar

1 *Chatti Chalamanna v. Subbamma*, 1. L. R., 7 Mad., 23; see also *Ramnad Zemindar v. Dorasami*, *ib.*, 341; *Collector of Thana v. Krishnanath*, 1. L. R., 5 Bom., p. 331.

2 *Kanhia Lall v. Muhammad*, 1. L. R., 5 All., 11.

3 *Corser v. Cartwright*, 1. R., 7 II. L., 731, followed in *Greender v. Mackintosh*, 1. L. R., 4 Cal., 897; see also *Bazayet v. Dooli Chund*, *ib.*, 402; *s.c.*, 1. R., 5 I. A., 211; *Land Mortgage Bank v. Bidyadhari*, 7 Cal. L. Rep., 460; *Anund Moye v. Grish Chundor*, 1. L. R., 7 Cal., 772.

4 *Hari Mahadaji v. Balambhat*, 1. L. R., 9 Bom., 233; *ante* pp. 207, 289.

5 Section 55 (4) (b).

6 Section 73.

7 *Nura Bibi v. Jagatnarain*, 1. L. R., 8 All., 295; and see section 95

disbursements.¹ There a conflict of opinion on the question whether on one of two sharers in an estate paying the revenue in order to save the estate from sale he is entitled to a charge on the share of the other holder; see note (2) to section 72. As to maintenance under Hindu law, see note to section 39.

In a case where it was argued on behalf of the tenants that a landlord, having under the Bengal Tenancy Act a first charge on the tenure for arrears of rent, became subject to the provisions of section 68 of this Act, it was held that section 68 was not one of the sections referred to in this section, and the opinion was expressed that the charge under the Bengal Tenancy Act was not a charge within the meaning of this Act.²

The provisions relating to a mortgagor apply, so far as may be, to the person owning property subject to a charge. It is not usually said of a person whose property is burdened with a mere charge that he has a right of redemption.³ It may be that he can pay off the debt and so extinguish the charge. In cases where the obligation is of a recurrent nature, as in the instances cited above, an extinguishment of the charge by payment is out of the question, and therefore any possibility of redemption is excluded. But as well in these cases as in cases where a capital sum is charged on property, the Court may, on the property becoming the subject of a sale, direct the substitution for it of other sufficient security, and thus in effect bring about the redemption of the property; and this may be done on the motion of the vendor of the property charged, or of the purchaser.⁴ The remedy by a suit for sale is the same as that which the holder of a charge under English law enjoys.⁵ Inasmuch as section 99 has to be read with this section the charge, such as is created in a decree for maintenance, can be enforced only by a suit under section 67.⁶

Note 2. The proviso must be read as referring to section 32 of the Trusts Act.

¹ *Todd v. Moorhouse*, L. R., 19 Eq., 69.

² *Fotick Chunder v. Foley*, I. L. R., 15 Cal., 492.

³ *Aliba v. Nann*, I. L. R., 9 Mad., 218; see *Girwar Singh v. Thakur Narain*, I. L. R., 14 Cal., p. 737, and *ante* p. 188.

⁴ See section 57.

⁵ *Tennant v. Trenchard*, L. R., 4 Ch., 537.

⁶ *Aubhoyessury v. Gonri-Sunkar*, I. L. R., 22 Cal., 559; *Matangini v. Chooney-money*, *ib.*, 903.

101. Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

Extinguishment of charges.

Commentary.

The question whether the purchaser of the equity of redemption may, after paying off the first mortgage, still rely upon it as against subsequent incumbrancers, was, after conflicting decisions of the Courts in this country,¹ authoritatively dealt with by the Privy Council in 1884.² Gokaldas being a creditor of the mortgagor, brought a suit against him, and in execution bought and got possession of the mortgaged property. Some months afterwards he paid off the balance due on the mortgage. A suit for possession was then brought against him by a second mortgagee, and it was contended for Gokaldas that he was entitled to possession of the property until the amount paid by him to the first mortgagee should have been repaid. This contention was upheld by the Judicial Committee, who laid it down that Gokaldas having the right to extinguish the mortgage or keep it alive, must be deemed to have adopted the course which would be most to his interest, and that therefore the first mortgage was not extinguished. The question, it was observed, was one of intention, and if there was no express evidence of intention, the ordinary rule should be followed, that a man having the right to act in either of two ways should be assumed to have acted according to his interest. That is precisely the rule laid down by the section which however in terms relates only to the case of an incumbrancer becoming the absolute owner of the property. The Judicial Committee here declined to follow the doctrine declared in

1 *Ramu Naikan v. Subbaraya*, 7 Mad. H. C., 229; *Venkatichella v. Panjanaden*, I. L. R., 4 Mad., 213; *Krishna v. Muttu*, I. L. R., 7 Mad., 127; *Gaya Prasad v. Salik*, I. L. R., 3 All., 582; *Har Prasad v. Bhagwan*, I. L. R., 4 All., 196; *Ali Hasan v. Dhirija*, *ib.*, 518; *Gaur Narayan v. Brajanath*, 5 Beng. L. R., 463; *Itcharam v. Raiji*, 11 Bom. H. C., 41; *Apaji v. Kavji*, I. L. R., 6 Bom., 64; *Mulchand v. Lallu*, *ib.*, 404, overruling *Itcharam v. Raiji*, *supra*; *Shantapa v. Balapa*, *ib.*, 561; *Dullabhadas v. Lakshmandas*, I. L. R., 10 Bom., 88; *Ramkrishna v. Chothulal*, I. L. R., 13 Bom., 348.

2 *Gokaldas v. Purnamal*, I. L. R., 10 Cal., 1038; s.c., I. L. R., 11 I. A., 126, followed in *Rupabai v. Audimulam*, I. L. R., 11 Mad., 345.

*Toulmin v. Steere*¹ as well because that case had been disapproved of in later cases, as because of the different practice in conveyancing prevailing in this country. On the other hand, in a case decided in 1883, the Committee held that, inasmuch as the plaintiff in lending money to pay off the first mortgage advanced it upon a mortgage made in his own favour, and could not have derived any benefit from an assignment of the prior mortgage except on the supposition of his own security proving to be invalid, the first mortgage was not kept alive. This decision proceeding on the special facts does not conflict with the decision in *Gokuldas' case*,² for it was considered that the plaintiff had no interest in keeping the original security alive and that on the contrary it was to his interest that the first mortgage should be extinguished. It was only because it turned out that his own mortgage was invalid that he bethought himself of having recourse to the other mortgage. There was no intermediate incumbrance to afford any reason for a desire on his part to keep the mortgage alive. Regard must be had to the position of things at the time when the assignment of the mortgage is taken. In the ordinary case of a man, having a mortgage on land of his debtor and then taking a further mortgage including the same land, it cannot be supposed that he had any intention of relinquishing his original security;³ but if there were no declaration of intention, express or implied, and it did not appear at the time of the assignment of the prior mortgage to have been for the benefit of the party to keep it alive, it follows that it would be extinguished.⁴ Following the decision in *Gokuldas' case*, the Madras Court has held, where land was first mortgaged to B, then charged under a registered decree passed in favour of C, and then mortgaged to D who paid off B's mortgage that an intention to have this mortgage kept alive should be presumed in D's favour, and that whether or not he had notice of C's lien he was entitled to stand as first incumbrancer. The sale which was prayed for by C was accordingly ordered to be made, subject to the lien of D for the amount paid by him in satisfying the first mortgage.⁵ In

1 3 Mer., 210; see *Anderson v. Pignot*, L. R., 8 Ch., p. 187; *Adams v. Angell*, 5 Ch. D., 634; *In re Pride*, [1891] 2 Ch., 135.

2 *Mohesh Lal v. Mohant*, I. L. R., 9 Cal., 961; *Tulsa v. Khub Chand*, I. L. R., 13 All., 581.

3 *Gokuldas v. Purnamal*, I. L. R., 10 Cal., 1038; s.c., L. R., 11 L. A., 126, followed in *Rupabai v. Andimulam*, I. L. R., 11 Mad., 345.

4 *Goluknath Misser v. Julla Prem Lal*, I. L. R., 3 Cal., 307; see *Kali Prasunno v. Kamini*, I. L. R., 4 Cal., 475; *Inordawar v. Gobind*, I. L. R., 23 Cal., 793.

5 *Shan Maun Mull v. Madras Building Company*, I. L. R., 15 Mad., 268; see *Gopal Chunder v. Heronbo*, I. L. R., 16 Cal., p. 529.

6 *Gangadhara v. Sivarama*, I. L. R., 8 Mad., 246; see *Kalicharan v. Ahmad*, I. L. R., 17 All., 48; *Nand Kishore v. Raja Hariraj*, I. L. R., 20 All., 29.

a case similar in its facts to the case last cited, where the plaintiff was a second mortgagee and the defendants had bought the equity of redemption and paid off the first mortgage, the Allahabad High Court was divided in opinion as to the right of the defendants to resist the suit for sale instituted by the second mortgagee.¹ Mahmood, J., held that under the rule in *Gokaldas' case* the defendant could not be understood to have acquired rights greater than those of the first mortgagee and that, as the latter could not have resisted a suit for sale at the instance of the second mortgagee, so the defendant, though entitled to possession until redeemed, could not prevent the plaintiff enforcing the security so long as such enforcement did not clash with the rights secured by the prior mortgage. This decision, which agrees with that of the Madras High Court, seems unquestionably right.²

In the converse case to that provided for in the section, *viz.*, where the mortgagor pays off an incumbrance it is clear that he cannot set it up against a subsequent incumbrance created by himself.³ Where property was sold under a decree obtained upon a mortgage and purchased by one of the mortgagees, it was held that, as a payment to one mortgagee would have been a good discharge against both, so the purchase by one must be taken to have discharged the incumbrance.⁴ In a case where the second mortgagee paid off the first mortgage, having no intention at the time to keep it alive and being unaware that the plaintiff had bought the mortgagor's interest, it was nevertheless held that the plaintiff seeking possession could only recover on the terms of recouping the defendant for what he had paid to free the property from the first incumbrance.⁵

Notice and Tender.

102. Where the person on or to whom any notice or tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent

Service or tender
on or to agent.

1 *Sirbadh Rai v. Raghunath*, I. L. R., 7 All., 568; *Janki Prasad v. Sri Mautangui*, *ib.*, 577.

2 *Raghunath v. Jurawan*, I. L. R., 8 All., 105; see *Salig Ram v. Hur Charain*, I. L. R., 12 All., 548; *Mata Din v. Kazim*, I. L. R., 13 All., p. 510.

3 *Platt v. Mendel*, 27 Ch. D., p. 251; as to discharge by payment to one mortgagee, see *Barber v. Ramana*, I. L. R., 20 Mad., 461 cited in note to section 60.

4 *Bhup Singh v. Zain-ul-abdin*, I. L. R., 9 All., 205.

5 *Lomba v. Vishvanath*, I. L. R., 18 Bom., 86, following *Mahomed Shamsool v. Shewukram*, L. R., 2 I. A., 7.

holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Commentary.

The expression 'district' is not explained either in this Act, the Contract Act, or the General Clauses Act. Probably it is intended to denote here as in the Civil Procedure Code the area over which a District Judge has jurisdiction. In the first case provided for, *viz.*, where service of notice or tender has to be made on or to a person not residing within the district in which the property lies, the notice may be served on, or the tender made to, a person holding a general power-of-attorney, or otherwise duly authorized to accept service or tender. With this provision may be compared that contained in the Civil Procedure Code with regard to the service of summons.¹ The case provided for in the second and third paragraphs, *viz.*, that in which the person concerned cannot be found in the district, or is unknown to the person interested to serve him with notice or to make a tender, does not exclude the possibility of there being an agent on whom notice can be served. But it is presumed that it was not intended that the course prescribed in these paragraphs should be pursued in cases where there is such agent.

The provisions of this section may come into operation when a mortgagor seeks to redeem,² when a subsequent mortgagee seeks to pay

¹ Sections 38, 41, and chapter vi.

² See section 60.

off the next prior incumbrancer,¹ and when a mortgagee seeks to exercise a power of sale.²

103. Where, under the provisions of this chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature, subject to its superintendence, the provisions contained in this chapter.

Commentary.

[The rules framed under this section by the High Courts of Bengal and Madras are given in Appendix II].

Note.—No provision is made in this Act or in the Contract Act with regard to mortgages or hypothecations of moveable property and there is no enactment in this country analogous to the English Bills of Sale

Hypothecation or mortgage of moveable property.

¹ See section 74.

² See section 69 (1) and (2).

Acts. Independently of those statutes it would seem that a mortgage or other transfer of property in chattels would in the absence of fraud confer a good title, although not accompanied by possession. According to English law the mortgage of a chattel may be made without a deed;¹ and according to the principle expounded in *Holroyd v. Marshall*² a contract that the mortgagee shall have a right and interest attaching upon property which may in future be brought on to premises operates as an assignment by way of mortgage of such future property. A contract giving the creditor power to enter on the debtor's premises and take possession of property is a different thing, for under it no interest arises until the power is exercised.³ The continuance in possession of the vendor is considered to be evidence of fraud, but it does not itself constitute fraud so as to render applicable the provisions of the statute of 13 Eliz., c. 5,⁴ which, it should be noted, unlike section 53 of this Act, extends to moveable property. There seems therefore to be no reason to doubt that here a mortgage of moveables cannot, in the absence of fraud, be defeated by a subsequent purchaser, unless of course the latter can shew that he has acquired a title as holder of a bill of lading or otherwise under section 108 of the Contract Act. Where a person, indebted to the plaintiff, hypothecated to him all the indigo crop that might grow on a certain plot of land during the year and afterwards mortgaged the same crop to the defendants, it was held that the transaction between the plaintiff and his debtor was governed neither by this Act nor by the Contract Act. It was in the nature of an agreement to mortgage property that might come into existence in future, and created a valid security in the plaintiff's favour.⁵ The mortgage of a growing crop, which is moveable property, does not require registration.⁶ It may be surmised that questions arising between the mortgagee of a crop who has made further advances on it and a second mortgagee of the same crop, will be determined according to the principle laid down in *Hopkinson v. Rolt*.⁷

1 *Flory v. Denny*, 7 Ex., 581; s.c., 21 L. J., Ex., 223.

2 10 H. L. C. 191; see *ante* p. 29.

3 *Reeve v. Whitmore*, 33 L. J., Ch., 63; see *Reeves v. Barlow*, 12 Q. B. D., 436.

4 *Martindale v. Booth*, 3 B. & Ad., 498; *Twyne's case*, 1 Smith's L. C., 9th ed., 1.

5 *Misri Lal v. Mozhar*, I. L. R., 13 Cal., 262; see *Jadowji v. Jetha*, I. L. R.,

4 Bom., 333; *Kerakoose v. Brooks*, 8 Moo. I. A., 339; see note to section 6, *ante* p. 28.

6 *Kaker Prasad v. Chaudan*, I. L. R., 10 All., 20; see *ante* pp. 10, 12.

7 9 H. L. C., 514 and see note to section 79.

CHAPTER, V.

OF LEASES OF IMMOVEABLE PROPERTY.

105. A lease of immoveable property is a transfer [1]
of a right to enjoy such property, made
Lease defined. for a certain time, express or implied, or in
perpetuity, in consideration of a price paid or promised, or
of money, a share of crops, service or any other thing of
value, to be rendered periodically or on specified occasions
to the transferor by the transferee who accepts the transfer
on such terms.

The transferor is called the lessor, the transferee is [2]
called the lessee, the price is called the
Lessor, lessee, pre- premium and rent. de- defined. premium, and the money, share, service or
other thing to be so rendered is called the rent.

Commentary.

Note 1. In a lease, as in a mortgage, there is a creation of right
Interest of lessee. in *re aliend*, which so far resembles the right of the
owner himself that it is good against all the world,
whether having notice of it or not. The right, therefore, cannot be
affected by any subsequent sale, lease or mortgage, by the owner of the
land. Moreover it may generally itself be transferred,¹ or pass on the
death of the lessee to his representatives. Thus it has been decided
that, if a lessee dies before the termination of a lease, the lessor has no
right to evict his representatives;² and that the representatives of a
lessee, though not parties to the contract with the original lessor, have
a right of action against the lessor's representatives who evicted the

1 Leases are *prima facie* assignable: *Beni Madhab Banerjee v Jai Krishna Mookerjee*, 7 Beng. L. R., 152; *Venkatasaawmy Naik v. Rani Kathama Natchiar*, 5 Mad. H. C., 227; *De Souza v. Pestonji Dhanjibhai*, I. L. R., 8 Bom., 408. It is otherwise with a tenancy by sufferance, *Adimuljam v. Pir Ravuthan*, I. L. R., 8 Mad., 424;

2 *Tej Chund v. Sri Kanth Ghose*, 3 Moo. I. A., 261; *Gobind Lali v. Hemendra*, I. L. R., 17 Cal., 686.

lessee,¹ and also are liable for the rent.² It has, however, on the other hand, been repeatedly held, that a lease whereby the lessee is given the power of holding the land as long as he chooses, is determined by his death.³ A lease may be made to take effect at a future time, and it is no objection that the land is meanwhile in the possession of a third person.⁴ But of course a person, seeking on the strength of such a lease to eject a third person, must prove his lessor's title⁵ either at the date of the lease or at some subsequent time, in which case he would be entitled to take advantage of the provisions of section 43 of this Act and section 18 of the Specific Relief Act. Moreover inasmuch as the term "immoveable property" includes incorporeal rights, the subject-matter of a lease is not necessarily land. There may be a lease of a fishery,⁶ or a lease of a *hât* which under section 107 may require registration.⁷

A lease must be distinguished from a license to use. The lessee has exclusive⁸ enjoyment of the land for the term created by the lease, whereas a licensee has granted to him merely "a right to do or continue to do, in "or upon the immoveable property of the grantor, something which "would in the absence of such right be unlawful," such right not amounting "to an easement or an interest in the property."⁹ It follows that a licensee cannot bring an action for trespass against a stranger,¹⁰ nor has he anything he can assign to a third person. Moreover, the authority which a licensee gives is, as a rule, revocable,¹¹ and according to English law is determined by the death of either party or by the

- ¹ *Burdakanthi Roy v. Aluk Munjoorce Dasiah*, 4 Moo. I. A., 321.
² *Badrinath v. Bhajan Lal*, 1 L. R., 5 All., 191.
³ *Vaman Shripad v. Maki*, 1 L. R., 4 Bom., 424.
⁴ *Pitchakutti v. Kamalla*, 1 Mad. H. C., 153; *Lokenath v. Jugobundhoo*, 1 L. R., 1 Cal., 297; see note to section 6, *ante* p. 30.
⁵ *Tiery v. Kristo Mohun*, L. R., 1 I. A., 76, the headnote of which is misleading.
⁶ *Ram Gopal v. Nurumuddin*, 1 L. R., 20 Cal., 446; where section 106 was in question.
⁷ *Surendra v. Bhai Lal*, 1 L. R., 22 Cal., 752.
⁸ *Reg. v. Morrish*, 32 L. J., M.C., 215; *Woodfall's Landlord and Tenant*, 12th ed., p. 115, and case cited in next foot-note but one: see also *In re Hormasji Irani*, 1 L. R., 13 Bom., 87, where the question was whether an agreement made in favour of the holder of pasture lands to pay so much a head for cattle grazing on the land was a lease within the meaning of the Stamp Act.
⁹ Easements Act, 1982, section 52.
¹⁰ *Ward v. Day*, 4 B. & S., 337, where a license to get all the copperas stone which may be found in part of a manor for 21 years, at the yearly rental of £25, was held not to be a demise, and consequently not to support a distress for the rent; see *Hill v. Tupper*, 2 H. & C., 121.
¹¹ *Krishna v. Rayappa Shanbhaga*, 4 Mad. H. C., 98; for exceptions from the rule see *Wood v. Manley*, 11 A. & E., 34, *Plimmer v. Mayor of Wellington*, 9 App. Cas., 699.

alienation of the property in question.¹ Where however in addition to the liberty to enter upon land, there is given a right to dig and remove soil, minerals or the like, there is a grant of an interest in the soil to which the license is regarded as merely accessory. Though in form a license, an instrument creating such a right as that may in fact be a lease.²

The definition of lease is so worded that many transactions not generally denoted by the term may be said to come within it. A lease is defined by Woodfall as "a conveyance by way of demise of lands or tenements, for life or lives, for years, or at will, but always for a less term than the party conveying himself has in the premises," and it is said to be "usually made in consideration of rent or some other annual recompense rendered to the party conveying the premises—who is called the lessor or landlord—by the party to whom they are conveyed or let, who is called the lessee or tenant."³ Under this section there may be a demise in perpetuity, that is, embracing the whole term which the demisor himself has; and instead of any annual recompense there may be a present payment of money in the shape of a premium. A demise made under such conditions without the reservation of any right of re-entry is, except for the possibility of forfeiture, undistinguishable from a sale, and on failure of heirs of the lessee the Crown would take by escheat rather than the heirs of the grantor.⁴ Again, instead of a payment in money or in kind, the consideration for the conveyance may consist of services to be rendered. It is true that in the English acceptation, rent may "consist of services and manual operations, as to plough so many acres of ground and the like; which services in the eye of the law, are profits." But it is not every transfer of a right to enjoy land in consideration of services which can be called a lease. For instance, a servant occupying premises belonging to his employer for the more convenient performance of his duties has no estate therein and is not a tenant, nor does any tenancy arise in the case of a servant occupying a cottage with less wages on that account.⁵ Occupation on such conditions gives no right to the notice to which a tenant is entitled. Similarly when it appeared in an

¹ See Chapter VI of the Indian Easements Act V of 1882, section 60; and *Coleman v. Foster*, 1 H. & N., 37; *Roffey v. Henderson*, 17 Q. B., 575.

² *Ward v. Day*, 4 B. & S., 337, and *Bainbridge on Mines*, 4th ed., pp. 447, 511.

³ Woodfall's *Landlord and Tenant*, 12th ed., p. 115.

⁴ *Tarachand Biswas v. Ram Gobind*, I. C. R., 4 Cal., p. 731; *Sohet Koor v. Himmut*, I. L. R., 1 Cal., 391; *Nil Madhab Sikdar v. Narattam*, I. L. R., 17 Cal., 826; and cases cited *ante* p. 40; as to forfeiture see note (1) to section 111.

⁵ Woodfall's *Landlord and Tenant*, 12th ed., p. 220.

ejectment-suit that the plaintiffs, *mirasidars* of a certain village, had let the defendants into possession on condition that they should do blacksmiths' work, it was held that the plaintiffs were entitled to a decree on proof that the defendants had ceased to do this work although no notice to quit had been given.¹ In this country grants of land burdened with an obligation on the grantee's part to perform certain services are not uncommon. But the relation between the grantor and the grantee has not generally been treated as that of a lessor and lessee. As to such grants see note 1 to section 106.

Note 2. The special characteristic of rent is that it is something to be rendered periodically or on specified occasions. According to English law it must be a profit, but, as has been seen, not necessarily money, for it may consist in services. Further, according to English cases, while it must issue out of the thing granted, it must not be a part of the thing itself. Then there would be an exception from the grant. However a royalty which a tenant agrees to pay on the bricks made out of a brickfield is a rent.² In amount the rent must be certain or capable of being reduced to certainty. In the Bengal Tenancy Act, it may be noted, the definition of rent excludes anything in the nature of services to be rendered. There must be something payable or deliverable in money or in kind, and in effect that is the meaning attached to the word rent in the Madras Act VIII of 1865. A similar construction has been placed upon the Rent Act XII of 1881 (N. W. P.).³

- [1] **106.** In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Duration of certain leases in absence of written contract or local usage.

¹ *Athakutti v. Govinda*, I. L. R., 16 Mad., 97.

² *Woodfall's Landlord and Tenant*, 12th ed., p. 464, citing *Reg. v. Westbrook*, 19 Q. B., 178.

³ *Waris Ali v. Muhammad*, I. L. R., 8 All., 552, per Mahmood, J., diss. Oldfield, J.

Every notice under this section must be in writing, [2] signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

• • • Commentary.

Note 1. A tenancy for an indefinite period, whether from year to year or month to month, may be determined by either party, without the consent of the other, giving a notice that it is to be at an end whereas in the absence of such notice legally given, the tenancy would continue. No question of notice can arise when a lease is determined in any other of the several modes mentioned in section 111, *e.g.*, by forfeiture, nor where the lease is given in perpetuity.¹

If by contract or by local custom any special rules as to notice are in force, it will be sufficient if the notice is given in accordance with those rules. But otherwise certain conditions are prescribed by this section as to the length of notice which should be given and the time when it should be made to operate. In the case of leases for agricultural or manufacturing purposes, to the former of which however this chapter is not applicable except in virtue of a special notification to that effect,² the tenancy is deemed to be from year to year; and following decisions based on the English rule³ the section prescribes for them a six months' notice terminating at the end of a year of the tenancy. With other leases, including leases of houses, the tenancy is deemed to be from month to month, and fifteen days' notice is required terminating with the end of the month.⁴ The section is clearly not exhaustive. A lease of property for an annual rent, or for a purpose other than agricultural or manufacturing, is not covered by it. The High Court of Bengal recently dealing with such a case applied the English rule of law.⁵

No fixed rule has been adopted by the Courts in this country either as to the length of notice which should be given or the time when it should be made to operate. In

¹ Kally Das v. Monmohini, I. L. R., 24 Cal., 446.

² See section 117; see Appa Rao v. Subbanna, I. L. R., 13 Mad., p. 65.

³ Nanabhai Rustamji v. Pestanji Jamsetji, 6 Bom. H. C., (A. C.), 31; Abdulla Rawutan v. Subbarayyar, I. L. R., 2 Mad., 346, in which case it was also held that where in an ejectment-suit the objection of absence of notice to quit was first raised on second appeal, the plaintiff is entitled to have an opportunity of meeting the objection and an issue on the point was directed to be tried.

⁴ See Khuda Baksh v. Sheo Din, I. L. R., 8 All., 405.

⁵ Kishori v. Nundkumar, I. L. R., 24 Cal., 720.

some cases the English six months' rule has been adopted,¹ but generally, it has been declared that a reasonable notice is all that is necessary.² In determining whether it is reasonable, regard must be had to the local customs as to letting lands and reaping crops, for a notice is not reasonable which requires a tenant to vacate his holding at a time when he would have no reasonable chance of obtaining another before the beginning of the cultivation season.³ But a notice may be reasonable, though it is less than a three months' notice and is not made to expire with the year.⁴

A notice to quit, like any other legal declaration of intention, must be clear and unambiguous. Coming from the landlord it must be so definite, that the tenant can act upon it and be assured that the landlord will not after the day named treat him as tenant and require rent from him. It has been held that proceedings taken under the Code of Criminal Procedure (Act X of 1882, section 530) could not be considered as a notice to quit for the purpose of maintaining a suit in ejectment.⁵ A notice which binds the landlord to nothing is no notice. Thus if the landlord says "if you are dissatisfied you can give up possession," or "unless you employ a larger number of workmen I shall determine your tenancy," there is no notice; and in the latter case there is only a threat. Where the words used were "if you do not quit within a month from this, I will sue you for rent at an enhanced rate," it was held that there was not a proper notice to quit.⁶ However, if the notice is otherwise definite, it is not vitiated by the addition of an offer of a new tenancy on higher terms. On the acceptance of the offer a new tenancy commences from the date named in the notice.⁷

The actual day on which the premises should be surrendered need not be specified. But the notice must designate the proper time. Where

1 See cases last cited, and *Narayan v. Kashi*, I. L. R., 6 Bom., 67; *Pandurang v. Yedneshwar*, *ib.*, 70.

2 *Prosunno Coomaree v. Sheikh Rutton*, I. L. R., 3 Cal., 686; *Ram Rotton v. Netro Kally*, I. L. R., 4 Cal., 339.

3 *Jubraj Roy v. Mackenzie*, 5 Cal. L. Rep., 231; *Lakshmi v. Chendri*, I. L. R., 8 Mad., 72; *Jagut Chunder v. Rup Chand*, I. L. R., 9 Cal., 48; *Radha Gobind v. Rakhal*, I. L. R., 12 Cal., 82; *Bidhumukhi v. Kofyutullah*, *ib.*, p. 93.

4 *Tej Protap v. Champa Kaleo*, I. L. R., 12 Cal., 96; *Kali Kishen v. Golam Ali*, I. L. R., 13 Cal., 3.

5 *Ram Rotton v. Netro Kally*, I. L. R., 4 Cal., 339.

6 *Bradley v. Atkinson*, I. L. R., 7 All., 598, 599.

7 *Ahearn v. Bellman*, 4 Ex. D., 201; *Mohamaya v. Nilmadhab*, I. L. R., 11 Cal., 533; *Woodfall's Landlord and Tenant*, 12th ed., p. 318.

the tenancy began on the first of the month, and on December 11th notice was given to quit within a month, the notice was held to be bad.¹ According to the English cases the notice must extend to the whole premises demised and not to a part only, or it will be invalid.² And the same rule, it is submitted, must obtain here; for it cannot be held that the extent of a tenant's holding may be reduced at the mere will of the landlord.

There is no provision for the case where it is unknown at what time in the year the tenancy actually commenced. In England the safest course in such a case is said to be, to give notice to quit "on a specified quarter-day" or "at the expiration of the current year of your tenancy which shall expire next after the end of one half-year from the service of this notice" and then to bring an action of ejectment at some time after the third quarter-day succeeding that mentioned in the notice.³ It is supposed that rent is payable on the usual quarter-days. Moreover when it is known that the tenant entered in the middle of a quarter, but he has paid his rent from quarter to quarter, the rule is that he shall be deemed to have entered, not on the day when he actually entered, but on the ensuing quarter-day, and that notice should be given accordingly. Apart from the Act, it would seem that a monthly tenancy would be inferred from the fact of a monthly rent being paid, as is usual in the case of houses, and that a month's notice would have been sufficient.⁴ Whether or not the shorter notice now required would have sufficed, does not appear to have been decided. It was also held that where there was nothing to show on what tenure a tenant held from his landlord, he should be presumed to be a yearly tenant and his tenancy should be determinable accordingly.⁵

Note 2. The notice must be given by the party or his authorised agent.⁶ Subsequent ratification will not make a notice given without prior authority operative.⁷ One of several joint-tenants may however give notice on behalf of all, or he may give notice in respect of his own share.⁸ According to English law a lessee holding under two joint-tenants may be

1 *Bradley v. Atkinson*, 1. L. R., 7 All., 598, 599; *Woodfall's Landlord and Tenant*, 12th ed., p. 319.

2 *Doe d. Rodd v. Archer*, 14 East, 245; *Woodfall's Landlord and Tenant*, 12th ed., p. 310.

3 *Woodfall's Landlord and Tenant*, 12th ed., p. 322.

4 *Nocoordass v. Jewraj*, 12 Beng. L. R., 263.

5 *Endar Lala v. Lalla Hari*, 7 Bom. H. C., (A. C.), 111.

6 *Bhojabhan v. Hayem Samuel*, 1. L. R., 22 Bom., 755.

7 Contract Act, section 200.

8 *Doe v. Chaplin*, 3 Taunt., 119; *Dwarkanath v. Kali Chunder*, 1. L. R., 13 Cal., 75; *Woodfall's Landlord and Tenant*, 12th ed., p. 316.

compelled to quit the premises on notice given by one of them, unless he chooses to come to an arrangement with the other joint-tenant as to his share. It is not necessary that the two should join in giving notice or that one should adopt the act of the other. Following this rule, Jardine, J., ruled in a case, arising in Bombay with regard to premises demised to the defendant by a Hindu and a Parsi, that the Muhammadan assignee of the Parsi's interest was competent by himself to give the notice to quit provided for in the lease, and to sue in ejectment without joining the other tenant-in-common. Had the parties been Hindus, he would apparently have ruled otherwise.¹ So in a case, where one of two co-sharers gave notice claiming enhanced rent, the notice was held to be insufficient, the Court observing that "if any one of several tenants-in-common, joint-tenants or coparceners, who is not acting by consent of the other as manager of an estate, is to be at liberty to enhance rent or eject tenants at his own peculiar pleasure, there manifestly would be no safety for tenants."² In another Bombay case where too the plaintiff, suing in ejectment, did not make his coparcener a party to the suit, it was held that the tenant could not be ejected at the suit of one coparcener and against the will of the other.³ And the law has been stated in the same way by the High Court of Bengal.⁴ In a case where a breach of covenant had been committed entitling the lessors to re-enter as upon a forfeiture, it was held that one of the joint-lessors could not insist on the forfeiture without the consent of the others.⁵ On the other hand it was held by a Full Bench that a suit for arrears of rent at an enhanced rate brought by all the shareholders would lie, though notice under Bengal Act VIII of 1859 had been given at the instance of some of the persons entitled only.⁶ Further it has been ruled by the same Court that, after notice has duly been given by several co-sharers and a suit for the recovery of the land has been instituted by them, the suit should not be dismissed because one of them withdraws from it. The remaining plaintiffs are still entitled to a decree for their share.⁷

The notice is to be given to the immediate tenant or his assignee, and should not be served on an under-tenant.⁸ Therefore where the

1 *Ebrahim v. Cursetji*, I. L. R., 11 Bom., 644, citing *Doe v. Summersett*, 1 B. & Ad., 135.

2 *Balaji v. Gopal*, I. L. R., 3 Bom., 23.

3 *Krishnarav v. Govind*, 12 Bom. H. C., 85.

4 *Radha Proshad v. Esuf*, I. L. R., 7 Cal., 414.

5 *Reasut v. Chorwar*, I. L. R., 7 Cal., 470.

6 *Ohuni Singh v. Hera Mahto*, I. L. R., 7 Cal., 633, followed in *Bidhu Bhushun v. Komaraddi*, I. L. R., 9 Cal., 864.

7 *Dwarkanath v. Kali Chundler*, I. L. R., 13 Cal., 75.

8 *Pleasant v. Benson*, 14 East, 234.

notice to quit was served on the mortgagee by sub-demise of the premises, it was held to be invalid and the action for ejectment brought by the reversioner was dismissed. It would have been otherwise if the mortgage had been by way of assignment,¹ for between the lessor and the lessee's assignee there is privity of estate. On the other hand a notice duly served on the lessee is binding on his sub-tenants since between them and the lessor there is no legal relation.²

If personal service of the notice is not effected, it must be served

Service of notice. on one of the family of the person to be served,

or on a servant at his residence, or, if that is impracticable, affixed to a conspicuous part of the property. It could hardly be contended that service on a third person being his agent to accept service, though not a servant or a member of his family, would be bad;³ or that proof of having posted a letter containing a notice would be insufficient in view of the general presumption in favour of the delivery of letters properly addressed and posted.⁴ It was recently held in Calcutta, without reference to this Act, that the service of notice to quit was sufficiently proved by evidence of the posting of the letter containing it and production of the letter with an endorsement on the cover purporting to be by an officer of the Post Office, to the effect that the addressee refused to accept the letter.⁵ It is clear that the publication of a notice in a newspaper, though it might be probable that the tenant had seen it, would not be sufficient to determine the tenancy.⁶ Delivery to a servant at the tenant's residence, or, if delivery to any authorised agent is sufficient, delivery to such agent would not be affected by the fact that such servant or agent failed in his duty to his employer with the consequence that the latter never received the notice at all. The party desiring to determine the tenancy, having done what he is bound to do, cannot be deprived of the benefit of his act, by the act or omission of a stranger.⁷ It is to be observed that the delivery or tender to a member of the family or servant is not to be on the demised premises, but at the residence of the person to be bound. In England it seems to have been held that service on a man's wife off the demised premises, at a place not proved to be his residence, is insufficient.⁸

1 Hogg v. Brooks, 15 Q. B. D., 256.

2 Timmappa v. Rama Venkamma, I. L. R., 21 Bom., 311.

3 Such service is good in England; Doe d. Prior v. Ongley, 10 C. B., 25.

4 Papillon v. Bruntton, 5 H. & N., 518; see Evidence Act, section 316.

5 Jogendro v. Dwarka Nath, I. L. R., 15 Cal., 861.

6 Chandmal v. Bachraj, I. L. R., 7 Bom., 474.

7 Tanham v. Nicholson, L. R., 5 H. L., 561.

8 Doe v. Street, 2 A. & E., 329; Woodfall's Landlord and Tenant, 12th ed., p. 327.

See further as to notice and its effect section 111 and note 5 thereto; and as to waiver of notice to quit section 113.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

Commentary.

The effect of this section is to make writing and registration necessary in the case of every lease, excepting only those which are made for a term of one year or less, and those which are under section 106 deemed to be leases from month to month. And the same formalities would appear to be necessary for the valid assignment of a lease.¹ In other words, in the cases where registration is compulsory under the Registration Act of 1877, to which this section is to be read as supplemental,² the present Act expressly requires a 'registered instrument,' in other cases it requires no instrument at all.³ A lease for one year only although it creates an interest in land exceeding Rs. 100 in value does not need registration.³ A lease is held to be for a term not exceeding one year, when the tenant contracts for one year and covenants to renew at the option of the landlord,⁴ or when after contracting for one year, he covenants 'I shall continue to pay the annual rent every year, and if I should fail to pay the rent any year the owner of the house shall be at liberty to recover the rent through the Court.'⁵ In such cases as these the lessee is on the expiration of the year a mere tenant-at-will, and the covenant for the extended period of tenancy at the option of one party is not such an accepted

1 *Gaya Prasad v. Baij Nath*, I. L. R., 14 All., 176.

2 See section 3 of the Amendment Act, *ante* p. 25. By Act XIII of 1889, section 32, this section is extended to every cantonment in British India. The language of section 17 (d) of the Registration Act III of 1877, is identical with that of this section, but 'lease' for the purpose of that Act "includes a counterpart, kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease." As to the meaning of "lease" in the Stamp Act, 1879, see *In re Hormasji Irani*, I. L. R., 18 Bom., 87.

3 *Seotharama v. Bayanna*, I. L. R., 17 Mad., 275.

4 *Apn Budgavda v. Narhar*, I. L. R., 3 Bom., 21.

5 *Khayali v. Husain Bakhsh*, I. L. R., 8 All., 198; *Boyd v. Kreig*, I. L. R., 17 Cal., 548; see *Hand v. Hall*, 2 Ex. D., 355.

'undertaking' or contract as is required in the definition of a lease in section 3 of the Registration Act of 1871. Similarly although a yearly rent is payable, a lease does not require registration when the tenant only holds, so long as the landlord will keep him in possession,¹ or may be required to quit on fifteen days' notice.² On the other hand, a *zur-i-peshgi* lease granted on the advance of a loan, to remain in force for one year but to continue in force if the loan were not then repaid, has been held to be a lease for a term exceeding one year, and therefore to require registration.³ Section 17 of the Registration Act contains a proviso empowering the Local Governments to exempt from its operation any leases 'the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.'⁴ The proviso, it has been held, is rendered ineffective with regard to leases required by the present section to be registered.⁵

It is clear that a mere memorandum of the rates of rent settled between a zemindar and his ryots, to which their signature is taken,⁶ or an entry in a zemindar's book signed by the ryot stating the extent of his holding and the amount of rent,⁷ is not a lease requiring registration. Such an entry, although neither stamped nor registered, may be used against the tenant as evidence of an admission. A document providing for payments by the tenant, in addition to those already provided for in a registered document executed by the landlord, is not a lease or an agreement to lease.⁸ Nor is a document by which the lessor agrees to reduce the rent payable under an existing lease.⁹ An agreement for a lease is treated as a lease under the Registration Act. It makes no difference that the agreement contains a proviso that a formal agreement should be drawn up and registered at the lessee's expense, at any rate if the agreement is otherwise in such terms as to indicate an intention

1 *Jagjivandas v. Narayan*, I. L. R., 8 Bom., 403; *Ratnasabhapathi v. Venkatachalam*, I. L. R., 14 Mad., 271; *Jivraj v. Atmaram*, I. L. R., 14 Bom., 319; see *Morton v. Woods*, L. R., 3 Q. B., 658.

2 *Khuda Baksh v. Sheo Din*, I. L. R., 8 All., 405.

3 *Bhobani v. Shibnath*, I. L. R., 13 Cal., 113.

4 This power has been exercised by the Government of Madras; see *Venkatachalam v. Audian*, I. L. R., 3 Mad., 358; and see *Virammal v. Kasturi*, I. L. R., 4 Mad., 381.

5 *Vairananda v. Miyakan*, I. L. R., 21 Mad., 109.

6 *Gopagapersad v. Gogan Singh*, I. L. R., 3 Cal., 322; *Luchmissur v. Mugsamat Dakho*, I. L. R., 7 Cal., 708.

7 *Narain v. Ramkrishna*, I. L. R., 5 Cal., 364.

8 *Kedarnath v. Surendro*, I. L. R., 9 Cal., 365.

9 *Satyesh v. Dhunpul*, I. L. R., 24 Cal., 20.

to create a present demise.¹ To constitute an agreement there must of course be acceptance as well as proposal, and thus a *deed darkhast* which is a mere proposal for a lease is not a lease within the meaning of the Registration Act. It may become a lease if the word 'granted' is written upon it and signed by the landlord.²

If the existence of a tenancy is proved or is inferred, as it may be, from payment of rent, and there is either no instrument of lease or the instrument is inadmissible for want of registration, the terms of the tenancy must be ascertained from other evidence. The tenant cannot be treated as a trespasser and ejected without notice.³ On the other hand the tenant cannot, because the lease is unregistered, object to the admission of other evidence of the terms on which he holds, and thus deprive the landlord of any right to eject which he may have.⁴ And a person holding under an unregistered lease may of course be liable for rents admitted by him to be due and payable, or for use and occupation.⁵ An instance in which one in occupation was held chargeable on that account is furnished by a recent case, when a decree for a certain sum by way of occupation rent was passed against the purchaser of a leasehold interest from the official liquidator of a company, no assignment in writing having taken place.⁶

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

Rights and liabilities of lessor and lessee.

A.—Rights and Liabilities of the Lessor.

- [1] (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover:

¹ *Purmanan Das v. Dharsey*, I. L. R., 10 Bom., 101.

² *Syed Sufdar v. Amzad*, I. L. R., 7 Cal., 703; *Lall Jha v. Negroo*, *ib.*, 717.

³ *Sonet Koor v. Himmut*, I. L. R., 1 Cal., 301.

⁴ *Venkatagiri v. Raghava*, I. L. R., 9 Mad., 142; but see *Nangali & Raman*, I. L. R., 7 Mad., 226; *Somu v. Rangammal*, 7 Mad. H. C., 13.

⁵ *Nangali v. Raman*, *supra*; *Lalun v. Sona Monee*, 22 W. R., 354.

⁶ *Gaya Prasad v. Baij Nath*, I. L. R., 14 All., 176.

(b) the lessor is bound on the lessee's request to put [2] him in possession of the property:

(c) the lessor shall be deemed to contract with the [3] lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession [4] is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease:

(e) if by fire, tempest or flood, or violence of an army or [5] of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision:

(f) if the lessor neglects to make, within a reasonable [6] time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:

(g) if the lessor neglects to make any payment which [7] he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor:

[8] (h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth, provided he leaves the property in the state in which he received it:

[9] (i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them:

[10] (j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease:

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee:

[11] (k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest:

[12] (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf:

[13] (m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents,

at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left:

(n) if the lessee becomes aware of any proceeding [14] to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor:

(o) the lessee may use the property and its products [15] (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto:

(p) he must not, without the lessor's consent, erect on [16] the property any permanent structure, except for agricultural purposes:

(q) on the determination of the lease, the lessee is bound [17] to put the lessor into possession of the property.

Commentary.

With reference to the covenants set out in this section, it must be remembered that in accordance with the maxim "*expressum facit cessare tacitum*," an express covenant, however restricted, will prevent any more general covenant on the same subject from being implied by law.¹

Note 1. (a) The obligation here imposed on the lessor may be

Lessor's duty (a) to disclose certain defects;

compared with that imposed on the bailor "to disclose to the bailee faults in the goods bailed of which the bailor is aware and which materially

"interfere with the use of them,"¹ or with the warranty on the seller's part that goods ordered and supplied for a specified purpose are fit for that purpose.² On the principle of this latter provision it has been held in England that, on a furnished house being let, there is a condition that it is fit for occupation at the time when the tenancy begins.³ Where therefore the tenant on entering the house discovered that it was unfit for occupation owing to defective drainage, and accordingly refused to enter, it was held that he was entitled to rescind his contract and was not liable for rent. But the English Courts decline to extend this principle to ordinary leases of lands, houses or warehouses;⁴ and generally the rule is that a landlord is entitled to assume that the tenant will examine the premises for himself and he is not bound to tell him that they are in a ruinous state. Where therefore it was alleged in the declaration that the defendant let a house to the plaintiff, knowing it was in a ruinous state and knowing that this was unknown to the plaintiff, and that the plaintiff being still in ignorance took possession, and that afterwards the house fell down, the declaration was held bad on demurrer, it not being averred that there was misrepresentation or that the plaintiff was precluded from ascertaining the state of the house.⁵ In Bengal however a tenant was held to be entitled to damages for the destruction of his furniture by a fire arising from the chimney of a thatched bungalow demised to him being in an uncompleted condition, it being said that the landlord should have disclosed the state of the chimney to him.⁶

Defect of title can hardly be deemed to come within this clause and there is no other provision for a covenant for title by the lessor. Under the Specific Relief Act (section 18), however, a contract for letting is declared not to be enforceable in favour of a lessor who, knowing himself to have no title to the property, has contracted to let the same, or of one who though he entered into the contract believing that he had a good title, cannot at the time fixed for completion give the lessee a title free from reasonable doubt. In the former case, that of the lessor knowing he had no title, the lessee would according to the English cases be entitled to have the lease set aside and would, at least if he had not taken possession, have a good defence to an action

¹ Contract Act, section 50.

² Contract Act, section 114.

³ *Wilson v. Finch-Hatton*, 2 Er. D., 336; *Smith v. Marrable*, 11 M. & W., 5.

⁴ *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D., 507.

⁵ *Keates v. Cadogan*, 26 L. J., C. P., 76.

⁶ *Radha v. O'Flaherty*, 3 Beng. L. R., (A. C.), 277.

for rent;¹ and on the same principle a similar concealment on the part of the vendor is treated as fraudulent in section 55. There seems to be no reason why this principle should not be extended to the case of lessor and lessee. It may be doubted whether the same relief would according to English law be open to the lessee after taking possession. Probably an action for damages on the implied covenant and, if the title to part only of the premises were defective, an apportionment of the rent would be the only appropriate relief.² In the other case, *viz.*, where the lessor believes that he has a good title and the mistake is only discovered after the lease is executed, the principle of the cases above cited is clearly inapplicable. An action for damages on the covenant for quiet enjoyment, or on the covenant for title, if there is one, will be the only remedy.

Note 2. (b) It is clear that a suit for rent is not maintainable when the lessee has not obtained possession of the property leased to him.³ And it has been held that when the demisor of land under a *kanam* document is unable to put the demisee in possession, the latter may throw up the agreement and recover the sum advanced as *kanam*.⁴ If the lessee finds that another tenant is in possession, he is not bound to eject him, but may sue the lessor for damages.⁵ Where a lessee, not having been put in possession, sued on a covenant by the lessor that in case of possession not being given he would make good "everything in the shape of loss" to which the lessee might be put in consequence, and measured his damages by the expenses he had had to incur in the suit for possession, and also the whole of the profits he expected to derive from the lease, it was held that he was only entitled to nominal damages.⁶ The fact that the land is in the possession of persons holding adversely to the lessor does not invalidate the title of the lessee, or prevent him from suing in ejectment, unless it appears that the transaction is not only speculative but contrary to public policy.⁷

1 *Mostyn v. West Mostyn Coal Co.*, 1 O. P. D., 145; *Edwards v. M'Leay*, 2 Sw., 287.

2 *Mostyn v. West Mostyn Coal Co.*, 1 O. P. D., p. 152.

3 *Bullen v. Lalit Jha*, 3 Beng. L. R., Appx., 119.

4 *Vayalil v. Valia*, 2 Mad. H. C., 315.

5 *Woodfall's Landlord and Tenant*, 12th ed., p. 644; and see note to section 55 (1) (f), *ante* p. 155.

6 *Mahomed Isa Khan v. Kisho Lal*, 6 Beng. L. R., Appx., 44.

7 *Prankrishna v. Biswambhar*, 2 Beng. L. R., (A. C.), 207; s.c., 11 W. R., 81; *Lokenath v. Jugobundhoo*, 1 L. R., 1 Cal., 297; see *Kalidas v. Kanhaya Lal*, 1 L. R., 11 Cal., 121; s.c., L. R., 11 I. A., 218; *Achayya v. Hanumantrayudoo*, 1 L. R., 14 Mad., 269, and *ante* p. 30.

Note 3. (c) By this clause the lessee enjoys the security of what in England is known as a covenant for quiet enjoyment in an unqualified form. The qualified covenant

(c) to secure possession.

for quiet enjoyment in an English lease protects the lessee against interruption by the lessor, his heirs and assigns 'or any other person claiming by or under him, them or any of them;' whereas in an unqualified covenant there are substituted for these words the following :—'or by any other person or persons whomsoever.'¹ A covenant of this latter kind would cover the case of the superior landlord exercising his right of re-entry on breach of a covenant by his lessee; but such an interruption would not constitute a breach of the qualified covenant, for the superior landlord cannot be said to claim by or under his own lessee.² The general words used in the unqualified covenant do not however include persons having no lawful title or right of entry.³ Against them the lessee has his proper remedy and does not require a covenant. Apart from the Act and in the absence of any express agreement, it has been held that, while the tenant cannot be compelled to pay rent in respect of land from which he has been evicted by one against whose acts the landlord could but for his remissness have protected him,⁴ the landlord is under no obligation to indemnify his tenant against the wrongful acts of third parties.⁵

It may be a question whether the reference to payment of rent and performance of covenants is intended to import a condition precedent. It has been held that the corresponding words in a lease, when followed by the words "he or they paying the rent thereby reserved and performing the covenants" have not that effect; but it seems to have been intimated that it would be otherwise if these words were inserted by way of proviso.⁶ The relation of the various covenants in a lease to

1 The covenant usually runs thus :—

"And the lessor doth hereby for himself, &c., covenant with the lessee, &c., that he and they paying the rent hereby reserved and performing the covenants herein before on his and their part contained, shall and may peaceably possess and enjoy the demised premises for the term hereby granted without any interruption or disturbance from or by the said lessor, etc., or any other person or persons claiming by, from or under him, them or any of them."

2 *Kelly v. Rogers*, (1892) 1 Q. B., 910.

3 *Woodfall's Landlord and Tenant*, 14th ed., pp. 646, 651; *Vithilinga v. Vithilinga*, I. L. R., 15 Mad., p. 121.

4 *Wajed Ali v. Chundrabutty*, 22 W. R., 542.

5 *Rassam v. Douzelle*, 23 W. R., 121.

6 *Edgo v. Boileau*, 16 Q. B. D., 117; *Dawson v. Dyer*, 5 B. & Ad., 584; *Woodfall's Landlord and Tenant*, 14th ed., p. 647; see *Venkateshwara v. Kesava*, I. L. R., 2 Mad., 187.

each other was discussed by Kay, J., in a case where the lease under discussion contained a covenant by the lessee to pay a certain rent and a restricted covenant by the lessor for quiet enjoyment, and proceeded:—"The said lessees . . . shall be entitled, on giving six months' notice before the expiration of the said term . . . to have a further lease of the said premises for a further term of 21 years . . . upon the lessees paying the rent and performing and observing the covenant of this present lease." One of the covenants on the lessee's part was to paint the inside and outside of the premises at certain fixed periods. It was held after an elaborate review of the authorities that the performance of the covenants was a condition precedent to the lessee's privilege of having a renewed lease, and that therefore the lessee, who had not completed the painting either when the six months' notice was given, or when it expired, was not entitled to a renewal of his lease.¹ The judgment in this case proceeded to some extent on the consideration that "the landlord must have intended by a covenant worded like this to say, 'I shall have the term in which to see whether you are such a tenant as I shall think it right and expedient to grant a new lease to, and the test I propose in words is this, whether when you come for your new lease . . . you have paid your rent and performed your covenants.'"² On the other hand, in a case before the High Court of Madras, where it appeared that a landlord had covenanted to give his lessee the option of purchasing the property at a certain date for a fixed sum, it was held that the fact of the lessee failing meanwhile to perform his covenant to pay rent did not preclude him from insisting on the "lessor's covenant, for it was said there is no natural connection between the lease and the right to purchase."³

A breach of the covenant for quiet enjoyment may consist in an interference with the title or with the enjoyment of the lessee. Merely calling on a sub-tenant not to pay his rent to the lessee does not amount to such interference,⁴ and a mere temporary trespass by the lessor is not necessarily a breach of the covenant.⁵ But where the defendant, the lessor, in consequence of the rent being in arrears, served notices on the sub-tenants, requiring them to pay rent to him and not to the lessee, and

1 *Bastin v. Bidwell*, 18 Ch. D., 288, following *Grey v. Friar*, 4 H. L. C., 565; *Finch v. Underwood*, 2 Ch. D., 310.

2 18 Ch. D., p. 250.

3 *Chidambra v. Manikka*, 1 Mad. H. C., 63; and see *Sanderson v. Mayor of Berwick*, 13 Q. B. D., p. 551.

4 *Whichcot v. Nine*, cited in *Edge v. Boileau*, 16 Q. B. D., 117.

5 *Newby v. Sharpe*, 8 Ch. D., 39.

refused to withdraw the notice on the request of the lessee, and one of the sub-tenants actually paid rent to him, it was held that there was evidence of a breach of the covenant, and that an action was maintainable.¹ It is a question of fact whether there has been a substantial interference with the lessee's enjoyment. It is not necessary to prove actual expulsion from the land.² In *Dennett v. Atherton*³ it was held that the covenant for quiet enjoyment does not guarantee to the tenant that he may lawfully use the land for any purpose. The case is put of an owner having worked out mines and then demising the land to a lessee who builds a house on it, and it is observed that it would be a novelty to read the covenant as a warranty that the land was capable of being used for any purpose. In *Sanderson v. Mayor of Berwick*⁴ the plaintiff and one Cairns held adjoining farms as tenants of the defendant. Cairns under the lease had a right to use the drains running through the plaintiff's lands for the purpose of carrying away the water from his land. These drains were defectively constructed and the consequence was that, although Cairns' use of the drains was proper, damage resulted to one of the plaintiff's fields from an escape of the water. This was held to be a substantial interruption of the plaintiff's enjoyment, and, as it was due to the act of Cairns who claimed under the defendant, the latter was liable under the usual covenant. On the other hand, the defendant was held not to be liable for damage occasioned to another field by a user of the drainage system on the part of Cairns which was excessive and unjustifiable. The conclusion would, it is apprehended, have been the same under the Act. Although the interruption of the lessee's enjoyment may be substantial and may be traced to an act which is in itself lawful and proper, still if the consequence of the act is extraordinary and unforeseen the lessor is not liable on his covenant. The covenant must be construed so as to give effect to what may reasonably be supposed to be intended by the lessor and lessee, and must not be read as a warranty securing the lessee against every possible consequence of acts lawfully done by the lessor or other persons. The plaintiffs and a certain company held two adjoining mines under leases granted by the defendant. The company, while properly working their mine, tapped what was called a feeder, the effect of which was to release

1 *Edge v. Boileau*, 16 Q. B. D., 117; see *Vithilinga v. Vithilinga*, 1 L. R., 15 Mad., p. 121.

2 *Somasundaram v. Fischer*, 1 L. R., 19 Mad., 60; see *Upton v. Townsend*, 17 C. B., 30.

3 L. R., 7 Q. B., 316.

4 13 Q. B. D., 547; *Wallis v. Hands*, [1893] 2 Ch., 75.

a large quantity of underground water, the existence of which had never been suspected, and ultimately to flood the plaintiff's mine. It was held that the company was not liable on the usual covenant for quiet enjoyment, because the inrush of water was not due to any direct interruption or to any act the consequence of which either was or ought to have been foreseen.¹

On the question of damages recoverable in such an action, it has been held that the measure is the value of the unexpired residue of the term and the amount of any damages recovered against the plaintiff by the ejector as mesne profits without interest.² And if the plaintiff has compromised the suit by paying money, he is entitled to recover the money so paid and his costs, although he has given no notice of his intention to compromise to the lessor; but it is of course open to the latter when sued on the covenant for title to prove that the plaintiff might have made a better bargain.³

Though by this clause, as by the English rule,⁴ the benefit of the implied covenant for quiet enjoyment passes to the assignee of the term, it does not necessarily continue during the whole term, as it ceases with the estate of the lessor who may be only a life-tenant. Thus if the lessee is evicted before the expiration of the term by the remainderman, he cannot bring an action on this covenant against the executor of the lessor.⁵ According to the English cases the covenant does not extend beyond the interest of the lessor, and therefore where by mistake an under-lease was given for ten years and a half by a lessee whose term expired in eight years and a half and the under-lessee was evicted by the superior landlord on the expiration of the term, it was held that the under-lessee could not recover on the covenant.⁶

Note 4. (d) A similar provision is made in the Bengal Regulation XI of 1825.⁷ The other existing law on the subject includes Act XVII of 1876 relating to Oudh, Act V of 1879 (Bombay), and Act XII of 1881 relating to the North-West Provinces.⁸

1 *Harrison & Co. v. Muncaster*, (1891) 2 Q. B., 680; see also *Jenkins v. Jackson*, 40 Ch. D., 71.

2 *Mayne on Damages*, 4th ed., p. 193.

3 *Mayne on Damages*, 4th ed., p. 193.

4 *Vyvyan v. Arthur*, 1 B. & C., 410; *Campbell v. Lewis*, 3 B. & Ald., 392; *Woodfall's Landlord and Tenant*, 12th ed., p. 645.

5 *Adams v. Gibney*, 6 Bing., 656.

6 *Baynes & Co. v. Lloyd & Sons*, [1895] 1 Q. B., 820.

7 See *Bhagabat v. Durg Bijai*, 8 Beng. L. R. 73.

8 Compare sections 63 and 70.

Note 5. (e) Apart from this provision, it would probably have been held in accordance with the English cases that the lessee's obligations under his lease would not be affected by the accidental destruction of a material part of the demised premises. The tenant of a house would have been bound to pay the rent, notwithstanding the destruction of it by fire.¹ Now it is open to the tenant of a coffee garden when the bushes are similarly destroyed to treat the lease as void and thus absolve himself from all obligation under it.² With this provision may be compared the rule of the Civil Law according to which the tenant is relieved from his obligations when the subject-matter demised turns out to be non-existent, or to be exhausted, or the working of it turns out to be utterly impracticable. There is in such a case a total failure of consideration.³ Here it is sufficient to prove a partial failure.

No provision is made in the Act regarding the tenant's obligation to pay rent after he has been evicted from the demised premises. A tenant may be expelled from possession by 'the Queen's enemies, by the violence of an army or of a mob, or other irresistible force.' In that case according to English law he would still remain liable for rent.⁴ Again, the tenant may be evicted by title paramount, or by the act of the lessor himself. In the latter case the obligation to pay rent is discharged, or rather suspended until restoration of possession is effected, although the eviction extends to part only of the premises.⁵ Eviction for the purpose of this rule means something more than a mere trespass. There must be an actual expulsion or a substantial interference with the tenant's enjoyment.⁶ In the case of eviction by title paramount extending to part of the demised land only, the tenant is entitled to a proportionate abatement of the rent, and this principle will be applied if owing to the lessor's want of title to part the lessee fails to obtain possession of the entire property demised.⁷

Note 6. (f) The lessor is not necessarily bound to make any repairs to deduct cost of whatever.⁸ When he has expressly covenanted to repairs; do so and commits a breach of the covenant, the

1 Venkateswara v. Kesava Shetti, I. L. R., 2 Mad., 187; Woodfall's Landlord and Tenant, 12th ed., p. 379.

2 Kunhayan v. Mayan, I. L. R., 17 Mad., 98.

3 Gowan v. Christie, I. R., 2 Sc. App., 273, 282.

4 Paradine v. Jane, 1 Aleyn, 26; Clifford v. Watts, I. R., 5 C. P., 586.

5 Dhunpat Singh v. Mahomed Kazim, I. L. R., 24 Cal., 296; Gopannnd v. Lalla Gobind, 12 W. R., 109.

6 Upton v. Townsend, 17 C. B., 30.

7 Imambandi v. Kamleswari, I. L. R., 21 Cal., 1005; see Smyth v. Raleigh, 14 R., 829.

8 Woodfall's Landlord and Tenant, 12th ed., p. 571.

lessee has no right to quit the tenancy; but under this clause he may now remedy the breach himself after giving reasonable notice to the lessor, and recover the amount expended by him together with interest, either by deducting it from the rent or otherwise at his option.

Note 7. (g) In England it is similarly the law that a lessee, who has paid under actual or implied compulsion any *to deduct taxes, &c.;* such impost as the land-tax, &c., for which the lessor is liable, may deduct the amount from the rent. There he has also a remedy by action, and here he might recover the amount under section 69 of the Contract Act. If however he prefers to avail himself of this remedy he ought to pay the rent under protest.¹ The clause would include a payment of ground-rent by the tenant in default of payment by his mesnie landlord.² In a recent case before the High Court of Bengal, it was held that a *patnidar*, who had made certain payments on account of Government revenue due from his landlord who had made default, was entitled to recover from him the amount so paid.³

Note 8. (h) The phrase 'attached to the earth' has a very wide meaning given to it.⁴ Subject to the proviso the *to remove his* lessee may under this provision remove trees and *buildings, &c.;* shrubs, walls, and buildings and things which he has himself planted or erected. All the distinctions made in English law between things which are and things which are not tenant's fixtures, things which he may or may not remove during his tenancy, are thus ignored. Previously to the passing of the Act it was held that the rule "*quicquid plantatur solo, solo cedit*" did not prevail universally in this country. The High Court of Bengal in a leading case held that according to the custom of the country buildings do not become the property of the owner of the soil merely because they are erected on it. The law was stated as follows:—"We think it clear according to the "usages and customs of the country buildings and other such improvements do not by the mere accident of their attachment to the soil become the property of the owner of the soil, and we think it should be laid down as a general rule that if he who makes the improvements is not a mere trespasser, but is in possession under any *bohā fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if

1 Woodfall's Landlord and Tenant, 12th ed., p. 535.

2 *Ib.*, p. 370.

3 *Dinonath Mookerjee*, I. L. R., 12 Cal., 213.

4 See section 3.

"it is allowed to remain for the benefit of the owner of the soil, the option of taking to the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."¹ The right of removal must be exercised during the continuance of the lease and therefore a tenant is not at liberty to re-enter on the land after its determination in order to remove trees which he has planted.² In the passage cited above from the judgment in *Paramanick's* case the right of compensation is stated as an alternative right arising in case the buildings are not removed by the person entitled to remove them. In the case of tenants at any rate the right of compensation is apparently excluded by the provision for removal. In order to create such a right there must be circumstances to give rise to an estoppel as against the landlord.³ A tenant cannot appeal to the provisions of section 51 of the Act, because he cannot affirm a belief that he was absolutely entitled to the property. With regard to trees planted by himself the tenant has the same right of removal under this clause as in regard to buildings.

Note 9. (i) This right is known in the English books as the right to take emblements; to emblements. It arises where the tenancy, being of an uncertain duration, is determined by the act of God or of the law between the period of sowing and the severance of the crops. It might arise in a case where the lease determines under section 111, clause (b), (c) or (h), but not in a case falling under clause (a), (d) or (g). It probably could not be claimed where there was a surrender of the tenancy under clause (e) or (f). Nor can it be claimed by a mortgagor retaining possession after the time allowed for payment.⁴ Nor can it be asserted against the purchaser in execution of a decree on a mortgage obtained by the mortgagee, who while in possession has raised crops on the land.⁵ The right is confined in England to the case of

¹ *In re Thakoor Chunder Paramanick*, Beng. L. R., Sup. Vol., 595; *Mudhoo Soodun v. Juddooputty*, 9 W. R., 115; *Russickloll v. Lokenath*, I. L. R., 5 Cal., 688; *Juggut Mohinee v. Dwarka Nath*, I. L. R., 8 Cal., 582; *Mahalatchmi v. Palani*, 6 Mad. H. C., 245; *Narayan v. Bholagir*, 6 Bom. H. C., (A. C.), 80; *Premji Jivan v. Haji Cassum*, I. L. R., 20 Bom., 298.

² *Ram Baran v. Salig Ram*, I. L. R., 2 All., 896; see *Dunia Lal v. Gopi Nath*, I. L. R., 22 Cal., 822.

³ *Shaik Hussain v. Goverdhandas*, I. L. R., 20 Bom., 1; *Jugmthandas v. Pallonjee*, I. L. R., 22 Bom., 1; *Nannihal v. Rameshar*, I. L. R., 16 All., 328; for English cases on estoppel see note to section 51.

⁴ *Land Mortgage Bank v. Vishnu*, I. L. R., 2 Bom., 670, *ante* p. 114.

⁵ *Ramalinga v. Samiappa*, I. L. R., 13 Mad., 15.

those crops which are annually produced by the labour of the cultivator, and therefore does not extend to fruit trees.¹ A question may arise here whether the outgoing tenant of a coffee garden is entitled to the growing crops; such a claim does not seem to be excluded by the words of the section.

Note 10. (j) In section 109 provision is made for the consequences of an assignment of the reversion or the lessor's interest; but except in respect of the implied covenant for quiet enjoyment, no similar provision is made for the case of an assignment of the term or the lessee's interest. This clause merely declares that the lessee may transfer his interest in whole or in part,² and that he does not thereby evade his liabilities. It has been held that this power of transfer is an ordinary incident of a tenancy.³ According to English law the consequence of the transfer of the whole term, whether by way of sale or mortgage, is to bring the transferee into immediate relations with the lessor. Privity of estate is said to be created between them⁴ and ceases as between the lessor and original lessee.⁵ It follows that, in order to determine the lease, notice must be given to the assignee and that a surrender made by the lessee after assignment is invalid.⁶ In respect of the breach of any covenant relating to the land committed after the assignment, but before the assignee has made an assignment over to a third person, the assignee may be held liable. And he may be sued for rent accruing due after the date of the assignment.⁷ Nevertheless the original lessee still remains liable on his covenants; it is not competent to him, as it is to the assignee, to shift his responsibility to one who may be a man of straw. The lessor is at liberty to sue him as well as his assignee for rent although he can have execution against one of them only.⁸ Only by the consent of the lessor can the lessee's liability be brought to an end on the transfer of his interest.⁹ Otherwise the lessee must rely on the obligation to indemnify, which arises as between himself and his assignee.¹⁰ For rent which accrued due before he took

1 Woodfall's Landlord and Tenant, 12th ed., p. 721.

2 See Johnson v. Wild, 44 Ch. D., 146.

3 Venkatasawmy Naik v. Rani Kathappa Natchiar, 5 Mad. H. C., 227; and see ante p. 349.

4 Kamala Nayak v. Ranga, 1 Mad. H. C., 24; and see Woodfall's Landlord and Tenant, 12th ed., p. 238.

5 Smith v. Gronow, [1891] 2 Q. B., p. 397.

6 Venkataramanier v. Ananda, 5 Mad. H. C., 120, and see note to section 106.

7 Macnaghten v. Lalla Mewa, 3 Cal. L. Rep., 285.

8 Kushanujan v. Anjelu, I. L. R., 17 Mad., 296.

9 Sasi Bhushin v. Tara Lal, I. L. R., 22 Cal., 494.

10 Pepin v. Chunder Seekur, I. L. R., 5 Cal., 811.

possession, a tenant is not ordinarily liable; and if there are any special circumstances which fix him with the liability, the landlord has the burden of proving them. Thus in a case where A had given a lease to B, who transferred it to C, and C mortgaged it to D, who afterwards foreclosed his mortgage and took possession of the land, D was held not to be liable to A for any rent which accrued due prior to his taking possession.¹

The ordinary right of the lessee to transfer his interest may, as is provided in section 10, be restrained by an express condition, and the breach of the condition may be an occasion for forfeiture;² or it may give rise to an action for damages as in a case where the tenant being under covenant not to assign or sublet without his landlord's consent, sublet the premises to a man who used them as a turpentine distillery, and the premises were in consequence of such use burnt down.³ Similarly a condition that his interest shall cease, on his endeavouring to dispose of his interest or on his becoming insolvent, is valid under section 12. As has already been pointed out, registration is equally necessary to complete the assignment of the term and of the reversion.⁴ Where however the defendant purchased the unexpired interest of a lease-holder, and entered into possession without a written assignment, he was held liable to the lessor for occupation-rent, and the rent fixed by the lease was accepted as a fair basis for the computation of the amount payable by him on this account.⁵

Note 11. (k) The duty cast on the lessee by this clause is analogous to that imposed on the buyer by section 55 (5) (a). But it is noticeable that the section does not contain any provision such as that at the end of section 55, which declares it to be fraud on the part of a buyer to fail in performing his duty to the seller under that clause. Nor is it provided that the lessor shall have a right of re-entry on a breach of the duty imposed. The only remedy the lessor can have is therefore by action for damages.

Note 12. (l) The time and place for the performance of contracts generally are regulated by sections 46 to 50 of the Contract Act. But the provisions of these sections leave, in the absence of special arrangements, the question what is a 'proper time and place' to be decided in each particular case as a question

1 *Macnaghten v. Lalla Mewa*, 3 Cal. L. Rep., 285.

2 See section 111 (g) (1).

3 *Lepa v. Rogers*, [1893] 1 Q. B., 31.

4 See note to section 107.

5 *Gaya Prasad v. Baij Nath*, I. L. R., 14 All., 176; cited in note to section 107.

of fact. In England a reserved money-rent is generally to be paid on the land; and the duty of the tenant is to have it ready at such time as to allow of its being counted before sunset on the day when it is due.¹ On the other hand, where there is a covenant for the payment of rent, the tenant must seek out the landlord (if he is within the four seas) for the purpose of paying or tendering the sum covenanted to be paid. If the tenant chooses to send the money by post without the consent of the landlord or without using due precautions, any loss thereby incurred will fall on him.² Further the exact sum due must be paid or tendered in currency, for if the landlord accepts a cheque, bond or promissory note, he only accepts security for the rent in arrear which does not bar his remedy by distress, &c.³ It should be observed that it is not competent to one of several joint-lessors to sue the lessee for his share of the rent payable under the lease to all the lessors, even if the other joint-lessors are joined as defendants in the suit.⁴ But if the other co-owners decline to join as plaintiffs, they may be made defendants and a decree may be obtained for the whole rent.⁵ As to the apportionment of rent, see sections 36 and 37.⁶

Note 13. (m) Apart from any positive act in breach of the duty imposed by this clause, the tenant is bound to maintain the property in the condition in which it was when let to him. If the building when demised was an old one in bad repair, it is not meant that at the end of the term the building is to be restored in a renewed form.⁷ On the other hand, if it was in good repair, the tenant is responsible for allowing it to fall into disrepair. The only defence he can raise, to an action claiming damages for his omission, is that the deterioration was due to reasonable wear and tear, or that it was caused by irresistible force, that is, the fire, tempest, flood, or violence mentioned in clause (e). The proviso would not cover the case in which the damage might have been prevented by reasonable care on the tenant's part, for instance if some repair to

1 *Haldane v. Johnson*, 8 Exch., 689; *Woodfall's Landlord and Tenant*, 12th ed., p. 368.

2 *Hawkins v. Rutt*, Peake, 248; *Woodfall's Landlord and Tenant*, 12th ed., p. 369.

3 *Davis v. Gyde*, 2 A. & E. 623.

4 *Manghar Das v. Manzur Ali*, I. L. R., 5 All., 40; and compare *Bindu Bashini Dasi v. Peari Mohun Bose*, I. L. R., 20 Cal., 107.

5 *Pergash Lal v. Akhowry Balgobind Sahoy*, I. L. R., 19 Cal., 735.

6 See also section 55 (6) (a).

7 *Lister v. Lane*, [1893] 2 Q. B., p. 216.

the roof would have counteracted the effect of the storm;¹ if the damage were the result of a fire lit by the tenant or his servants but not kept with due care, it is clear that the tenant would not be excused. It would be incumbent on him to show that the fire was in its origin accidental.² The measure of damages, chargeable against a tenant who fails to deliver up the premises in due repair, is the amount reasonably required for putting them into the state of repair in which they ought to have been left. The fact that the lessor has made such a bargain with another tenant as to prevent his suffering any loss by the breach of the covenant to repair is no answer to the action.³ The obligation to restore the demised premises in good condition is not affected by the mode in which the lease is determined.⁴

Note 14. (n) A tenant cannot bind the inheritance either by his positive act or by neglect.⁵ Even if the tenant is dispossessed, time does not run in favour of the trespasser except from the expiration of the term.⁶

*to give notice of
encroachment;*

Nevertheless it is clearly to the interest of the lessor to be informed of anything which may prejudicially affect his property. In his relations to the lessee he has an interest in knowing of any encroachment on the land or of any proceeding threatened against his property, because under clause (c) he has contracted that the lessee shall during the term of the lease hold the property without interruption. Encroachments made by the tenant on land adjoining to, or in the neighbourhood of, his holding generally enure to the benefit of the landlord. This is the rule of English law, and it has been applied here.⁷ The principle on which the rule rests appears to be that recognised in the Indian Trusts Act, section 90.

Note 15. (o) This clause has reference to acts of voluntary waste, not to matters of negligence or omission. The tenant may not change the nature of the property or use it in a manner inconsistent with the purpose for which it was demised;⁸ for instance, according to the English cases,

*not to commit
waste;*

1 *Saner v. Bilton*, 7 Ch. D., p. 823.

2 *Filliter v. Hubbard*, 17 L. J., Q. B., 789.

3 *Joyner v. Weeks*, [1891] 2 Q. B., 31; *Henderson v. Thorn*, [1893] 2 Q. B., 164.

4 *Sarafali v. Subraya*, I. L. R., 20 Bom., 449.

5 *Daniel v. North*, 11 East., 370.

6 *Sharat Sundari v. Bhobo Pershad*, I. L. R., 13 Cal., 101.

7 *Nuddiyar Chand v. Meajan*, I. L. R., 10 Cal., 820; *Woodfall's Landlord and Tenant*, 12th ed., p. 714.

8 See *Mene v. Cobley*, [1892] 2 Ch., 253; *Ramanadhan v. Ramnad Zamindar*, I. L. R., 16 Mad., 407.

he may not convert arable land into wood, or grass-land into arable : and here it has been held that a tenant who plants mangoes on an agricultural holding commits a breach of duty for which damages may be recovered.¹ Similarly where a sub-lessee, in breach of the terms of the lease, made excavations injuriously affecting the land, he was ordered to restore it as nearly as possible to its former condition;² and where a ryot had dug a tank, the burden of proving that he was using the land fairly and reasonably, was thrown on him.³ As instances of voluntary waste may be mentioned felling timber, pulling down houses, opening mines and pits and removing the soil.⁴ But if the tenant uses the premises in a reasonable and proper manner, having regard to the purpose for which they were demised, he is not liable as for waste. The tenant of a warehouse or godown is not liable in damages in consequence of its falling down from overloading, unless it is shown that he has loaded the building in an unreasonable or improper way.⁵ This clause however must be read with clause (h) and therefore it cannot be waste to cut down trees or dismantle buildings which have been planted or erected by the lessee himself.

Note 16. (p) Except for agricultural purposes the tenant is not permitted to build a house, or other permanent structure. This is not now the law in England, for it is considered that, unless the building is such as to prove an injury to the inheritance, there is no waste. The tenant may therefore lawfully erect buildings which improve the value of the land.⁶ Here even the fact that the tenant had improved the land would afford him no defence. On the other hand, the tenant is under the Act at liberty to remove 'all things which he has attached to the earth,'⁷ which according to English law is, apart from statute, not generally permissible.⁸ It has been

1 *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 609; *Bholai v. Bansi*, I. L. R., 4 All., 174. It has been decided with regard to a tenant of a zamindar that a tenancy is not determined by the mere fact of the land remaining uncultivated, see *Dina-bandhu v. Lokanadhasami*, I. L. R., 6 Mad., 322.

2 *Monindro Chunder Sirkar v. Monceruddeen*, 11 Beng. L. R., Appx., 40; *Lakshmana v. Ramachandra*, I. L. R., 10 Mad., 351.

3 *Tarini Charan v. Debnarayan Mistri*, 8 Beng. L. R., Appx., 69.

4 *In re Purmanandas Jiwandas*, I. L. R., 7 Bom., 109; *Nafar Chundra v. Ram Lal*, I. L. R., 22 Cal., 742; *Mon Mohini v. Raghoonath*, I. L. R., 23 Cal., 209; and see section 66.

5 *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D., 507; *Saner v. Bilton*, 7 Ch. D., 815; *Koegler v. Yule*, 5 Beng. L. R., 401.

6 *Jones v. Ghappell*, L. R., 20 Eq., 539.

7 See clause (h)

8 *Woodfall's Landlord and Tenant*, 12th ed., p. 607.

held in this country, independently of the Act, that a tenant of non-agricultural land not having any permanent tenure, may be restrained by injunction from erecting a "pucca" building.¹ But although it may be proved that the tenant has altered the character of the land so as permanently to injure the interest of the landlord, it is not in all cases that the latter will have a remedy by injunction. By standing by and allowing the tenant to go on with the work without objection he may disentitle himself to the assistance of the Court.² (See note 8 above.)

Note 17. (p) When a lease expires, the tenant remains liable for the rent unless he delivers up complete possession of the land or the lessor accepts another in his place.³ If the premises are in possession of an under-tenant, and on his refusing to quit the landlord has to bring a suit to eject him, the tenant is liable in damages for the value of the premises during the time the landlord was kept out of possession and for the costs of ejectment.⁴ Further, a tenant is bound to preserve the boundaries of the land held by him in that capacity, and to render up the landlord's land specifically.⁵ The *onus* lies on him of distinguishing his own property;⁶ and in a case, where the tenant's own land had become indistinguishably confounded with his leasehold, he was held bound to deliver to the landlord a portion of the lands confounded, equal in value to the land demised.⁷ As the possession of the lessee is the possession of his lessor, he cannot by any user of other land of the lessor acquire an easement over the latter in favour of his own holding.⁸

- [1] **109.** If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess

Rights of lessor's transferee.

¹ *Jagganath v. Prosonno*, 9 Cal. L. Rep., 221.

² *Noyna Misser v. Rupikun*, I. L. R., 9 Cal., 609; Specific Relief Act I of 1877, section 56.

³ *Harding v. Crethorn*, 1 Esp., 57; *Christy v. Tancred*, 7 M. & W., 127; *Roberts v. Hayward*, 3 C. & P., 432.

⁴ *Henderson v. Squire*, L. R., 4 Q. B., 170.

⁵ *Attorney-General v. Fullerton*, 2 Ves. & B., p. 264; *Spike v. Harding*, 7 Ch. D., 871.

⁶ *Wake v. Conyers*, 2 W. & T. L. O., 6th ed., p. 438, and notes thereto; and see *Venkatesh Narayan v. Krishnaji*, I. L. R., 8 Bom., 160.

⁷ *Dugappa v. Tirthasamy*, I. L. R., 6 Mad., 263.

⁸ *Udit Singh v. Kashi Ram*, I. L. R., 14 All., 185; *Dale v. Bhajju*, I. L. R., 16 All., 181; *Kristna v. Vencatachella*, 7 Mad. H. C., p. 64.

all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may deter-^[2]mine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Commentary.

Note 1. On the transfer of the lessor's interest the benefit of the covenants relating to the land passes to the transferee; and on him, if the lessee so elects, the burden of those covenants devolves. So far as concerns the benefit of covenants the English rule is the same;¹ on an assignment of the reversion the lessee ceases to be liable to the lessor on covenants, which run with the land and therefore pass to the assignee of the reversion. But as to the burden, the English rule differs from that laid down in the section. Here the lessor does not, by assigning his interest to a third person, shift his responsibility under the lease. It is only on the lessee's election to hold the assignee responsible that the lessor's liability will cease. On an election being made, it is presumed that the lessee will not, after exercising it, be entitled to change his ground and look to the lessor for the performance of the covenants. Section 108 (j), dealing with the effect of a transfer of the lessee's interest, contains no corresponding provisions for an election by the lessor.

It is surmised that the phrase "rights and liabilities as to the "property" may be taken to correspond generally with covenants

¹ See *Kristo Nath v. Brown*, I. L. R., 14 Cal., 176.

running with the land in English law. According to English law all implied covenants and those express covenants, which touch and concern the property demised, run with the land.¹ Besides the rights and liabilities which, in the absence of a contract to the contrary, arise by force of the provisions of the preceding section, there would pass to the lessor's assignee the right in respect of a covenant to repair, or in respect of a covenant not to sublet or assign without license, and on the other hand he would, at the lessee's option, become subject to the obligation arising from express covenants to repair the premises, to supply water, or to renew the lease. All these covenants have been held to run with the land. The English law relating to covenants running with the land, as it existed previously to recent legislation on the subject, has been summarised above in the words of the Real Property Commissioners (see note to section 40). Now, since the Conveyancing Act, 1881, both the benefit and the obligation of the covenant relating to the land demised are annexed to and go with the reversion and the term on their assignment.² As to the proviso, see note to section 50.

No provision is made for the liabilities of the purchaser of a lease or the under-lessee. He is bound by covenants running with the land and by covenants of which he has notice; and as he is assumed to have examined his vendor's or lessor's title, and therefore to have seen the lease, he is taken to have notice of the covenants therein. "A purchaser or mortgagee is bound to inquire into the title of his vendor or mortgagor and will be affected with notice of what appears on the title if he does not so inquire; nor can it, I think, be disputed that this rule applies to a purchaser or mortgagee of leasehold estates as much as it applies to a purchaser or mortgagee of freehold estates, or that it applies equally to a tenant for a term of years."³ The tenant is not affected by a restrictive covenant which would not have been disclosed by an examination of the title. Thus, where the defendant was tenant of one who had taken from the plaintiff under a conveyance and at the same time entered into a collateral agreement with the plaintiff not to use the premises in a certain way, a bill for an injunction against the tenant was dismissed. The agreement not having been referred to in the conveyance and not being mentioned to him by his lessor, the tenant had no means of knowing of its existence.⁴

1 Woodfall's Landlord and Tenant, 12th ed., p. 149; Spencer's case, 1 Smith's L. C., 9th ed., p. 65, and notes thereto.

2 24 & 45 Vic., c. 41, sections 10, 11, 58, 59, 60.

3 Wilson v. Hart, L. R., 1 Ch., p. 463; Patman v. Harland, 17 Ch. D., 353.

4 Carter v. Williams, L. R., 9 Eq., 678.

Note 2. If a man leases two houses at an entire rent, and afterwards sells one house to a third person, the tenant will not, unless he concurs in the apportionment of the rent, be liable to be sued by the purchaser for the apportioned rent. The single obligation cannot be converted into two obligations without the consent of all parties. In the absence of such consent the apportionment must be made by the Court.¹ Under the Act however it seems that on severance of the right, and reasonable notice thereof being given, there follows a severance of the obligation; and the mode in which the apportionment should be made will be that prescribed by section 37.

110. Where the time limited by a lease of immoveable [1] property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Exclusion of day
on which term
commences.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Duration of lease
for a year.

Where the time so limited is expressed to be terminable [2] before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to deter-
mine lease.

Commentary.

Note 1. The rule of excluding the day, from which a period of time is to be computed, is that generally adopted.² It is so with limitation. As a decree-holder has until the end of the third anniversary of the date when the decree was passed to execute his decree, so a lessee for a year from the 29th September 1885 has until the end of the same day in 1886 to enjoy the premises.

Note 2. This provision refers to the case where a lease is given "for seven, fourteen or twenty-one years," or on some similar terms.

1 Bliss v. Collins, 5 B. & Ald., 876; Woodfall's Landlord and Tenant, 12th ed., p. 372.

2 General Clauses Act I of 1868, section 3 (2); Lindley's Thibaut, lrv.

The lessor may reserve the option to himself or the lease may be determinable by mutual consent only. But if no such intention appears the option rests with the lessee.¹

Determination of lease. **111.** A lease of immoveable property determines—

- [1] (a) by efflux of the time limited thereby:
- (b) where such time is limited conditionally on the happening of some event—by the happening of such event:
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:
- [2] (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right:
- [3] (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them:
- (f) by implied surrender:
- [4] (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease:
- [5] (h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to clause (f).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

¹ Compare Woodfall's Landlord and Tenant, 12th ed., p. 331.

. Commentary.

Note 1. (a) On the expiration of the term for which a lease has been granted the lessee and his under-tenants or assignees may be ejected without notice to quit. For the case of his continuance in possession with the lessor's consent section 116 provides. In the absence of such consent he is a tenant-at-sufferance (see note to that section).

(b) and (c) A lease for twenty-one years, if the lessee or some other person named should so long live, would be a case in illustration of clause (b). With reference to the provisions of clause (c) it may be noted that if the lessor holds for his own life or for that of another person only, or "as long as he pleases," the lease would determine on the death of himself or that person.¹

Note 2. (d) This is a case of merger.* A man cannot be at once landlord and tenant of the same premises, any more than he can be at once creditor and debtor in respect of the same matter. The merger may occur on succession, or by the lessor releasing his interest to the lessee. In England the lessee who purchases the reversion may, by taking a conveyance of it to a trustee for himself, prevent a merger. In such a case the term is called a term in gross and would pass as personal estate on his death, while the reversion would descend to his heir.²

Note 3. (e) and (f) No particular words are essential to make a good surrender.* Whether the surrender is express or implied, the persons concerned must be, on the one hand, the immediate tenant and, on the other, the holder of the immediate reversion; and there must be consent on the landlord's part to acceptance of the surrender.³ A surrender by the lessee after he has assigned the lease to a third party can be of no effect against the assignee.⁴ Generally a surrender is effected by an agreement to

¹ See also sections 10—34 as to conditions; *Vaman Shripad v. Maki*, I. L. R., 4 Bom., 424.

² *Woodfall's Landlord and Tenant*, 12th ed., p. 285; see *Jibanti v. Gokool*, I. L. R., 19 Cal., 760.

³ *Belaney v. Belaney*, L. R., 2 Ch., 168; and compare section 101.

⁴ *Bhatia Dhondu v. Ambo*, I. L. R., 13 Bom., 294; see *Narasimma v. Lakshmana*, I. L. R., 13 Mad., 124.

⁵ *Judoonath v. Schoene, Kilburn & Co.*, I. L. R., 9 Cal., 671; *Balaji Sitaram v. Bhikaji*, I. L. R., 8 Bom., 164.

⁶ See note 10, section 108.

determine the existing tenancy acted upon by both the lessor and lessee.¹ It follows that mere non-payment of rent does not operate as a surrender.² Surrender of part of the demised premises does not operate as a surrender of the whole.³ The tenancy subsists notwithstanding, and with it the lessee's liability on his covenant to pay rent. Where the assignee of a lease surrendered part of the premises and in consideration thereof the lessor improved the remaining part, so that the value of the premises in the lessee's hands was not lessened, it was held that the lessee was still liable on his covenant to pay the whole rent.⁴

A surrender by operation of law, or an implied surrender, is created by the acceptance of, but not by a mere agreement for, a new lease which in fact estops the lessee from setting up the old one.⁵ Such a surrender takes place when the lessee assents to a lease being granted to another and gives up his possession to the new lessee.⁶ A written request by the tenant to the landlord to let the premises to some other person may, when acted upon, amount to a surrender by act and operation of law.⁷ Similarly where the landlord permitted a tenant from year to year to quit in the middle of a quarter, and the tenant in fact did quit and the landlord accepted possession, it was held to be a surrender by operation of law.⁸ In its result a surrender, however made, brings about a merger. On an interest for life or years being yielded up to the person entitled to the immediate interest in reversion or remainder, a merger of the interests in possession and reversion takes place; and this may be done on conditions, and if the conditions are broken the surrender is annulled and the surrenderor may re-enter into possession as before. In England every express surrender must be in writing.⁹

Note 4. (g) (1) Forfeiture may operate to determine any lease, even a lease which is otherwise intended to last in perpetuity.¹⁰ The mere breach of a covenant does

1 *Phené v. Popplewell*, 12 C. B., (N. S.), 334; *Reeve v. Bird*, 1 C. M. & R., 31; *Whitehead v. Clifford*, 5 Tunt., 517; and see on the other hand, *Johnstone v. Huddleston*, 4 B. & C., 922; *Cannan v. Hartley*, 9 C. B., 634.

2 *Obhoya v. Koilash*, I. L. R., 14 Cal., 751; *Prem Sukh v. Bhupia*, I. L. R., 2 All., 517.

3 *Holme v. Brunskill*, 3 Q. B. D., pp. 501, 505; *Baynton v. Morgan*, 21 Q. B. D., 101.

4 *Baynton v. Morgan*, *supra*.

5 *Lyon v. Reed*, 13 M. & W., 285; *Woodfall's Landlord and Tenant*, 12th ed., p. 276.

6 *Wallis v. Hands*, [1893] 2 Ch., 75.

7 *Nickells v. Atherstone*, 10 Q. B., 944.

8 *Grimman v. Legge*, 8 B. & C., 324.

9 *Woodfall's Landlord and Tenant*, 12th ed., pp. 273, 275.

10 *Kally Dass v. Monmohini*, I. L. R., 24 Cal., 440.

not involve a forfeiture.¹ There must be a condition that on some given event the lessor may re-enter, or the lease become void. A clause in a lease, stipulating that the lessee shall not transfer his interest to any third person and that any such transfer shall be void, but not reserving any right of re-entry, is void under section 10 of the Act, because such a condition is not for the benefit of the lessor.² It matters not what the covenant is, whether a covenant to insure or repair, a covenant not to alienate,³ a covenant to use the premises in a particular way,⁴ or a covenant to pay rent. If such covenant has a proviso for re-entry attached to it, there is a case for forfeiture subject in the last instance to the provisions of section 114. With reference to the ordinary form in which a power of re-entry is reserved, *viz.*, on the lessee failing or neglecting to perform any of the covenants, it has been ruled that a power so reserved does not apply to a breach of a negative covenant, such as a covenant not to assign or under-let the premises without the lessor's consent.⁵ The opinion has been expressed that the alienation of a portion of a tenure by one or several sharers in breach of a condition would not work a forfeiture of the whole tenure.⁶

(2) In the second place an occasion for a forfeiture arises when the tenant repudiates the landlord's right and claims title in himself or in a third person. Such conduct on the part of the tenant, which may consist of parol declarations only, is sufficient to determine the lease, when followed by conduct on the part of the landlord indicating his intention so to determine it. Acts done or declarations made by the tenant which are not brought to the notice of the landlord have no legal effect.⁷ According to the English law mere words on the part of a tenant are not enough to entitle the landlord to put an end to a subsisting term as distinguished from a tenancy from year to year. In the latter case notice is dispensed with because it is idle to give notice when the tenant denies the tenancy. In the case of a term there must be some additional act, *e.g.*, attornment to a stranger, to work a forfeiture.⁸

1 Bibi Sahodra v. Rai Jang Bahadur, I. L. R., 8 Cal., 224; Narayan v. Ali Saiba, I. L. R., 18 Bom., 603; Madar Sahib v. Saahabawa, I. L. R., 21 Bom., 195.

2 Nil Madhab Sikdar v. Narattam, I. L. R., 17 Cal., 826.

3 As to this covenant, see section 12.

4 Noyna Misser v. Rupikun, I. L. R., 9 Cal., 609; as to construction of covenants not to alienate see note 2 to section 12.

5 West v. Dobb, L. R., 5 Q. B., 460; Hyde v. Warden, 3 Ex. D., p. 72.

6 Dassorathy v. Rama, I. L. R., 9 Cal., 526; compare Ishan Chander v. Shama Churn, I. L. R., 10 Cal., 41.

7 Garbanandha v. Pran Sankah, I. L. R., 15 Cal., 310.

8 Doe v. Wills, 10 Ad. & E., 435; Vivian v. Moat, 16 Ch. D., 730.

This distinction is not observed by the Act and was disregarded before the Act came into force.¹ The law laid down by the Courts here differs from the English law also in regard to the nature of the disclaimer which has to be proved. In *Vivian v. Moat*² the claim of a tenant from year to year to hold as a permanent tenant was held to be a repudiation of the landlord's title, on which the latter could eject the tenant without notice. The High Court of Bengal declined to follow this case as being inapplicable to a country "where rights grow up under the law, such as "rights of occupancy, irrespective of contract, and where there are "numerous tenures held by persons at fixed rents." It was held that for a tenant only to question the landlord's right to enhance the rent was not a disclaimer of the title such as to involve a forfeiture.³ And this view has in recent cases been adopted in Bombay,⁴ in Madras⁵ and in Allahabad.⁶

A difference of opinion has further arisen on the question whether or not a denial of the landlord's title, made in the
Denial must be prior to suit. suit only, can be relied upon by the landlord in justification of want of notice to quit. In the first of the Bombay cases cited below,⁷ where the claim to hold as a permanent tenant was made in the pleadings and is, not stated to have been made before the suit, the point was not argued, but it seems to have been assumed that a denial of title made at that stage was sufficient to justify ejectment without notice. But more recently it has been ruled in Bombay that the denial of the landlord's right, on which in part his cause of action is based, must be antecedent to the institution of the suit.⁸ And this ruling is in accordance with the opinion held in Calcutta⁹ and in Madras.¹⁰ A denial by one of several tenants, if found to be made on behalf of all, may entitle the landlord to proceed against all.¹¹

1 *Sutyabhama v. Krishna*, I. L. R., 6 Cal., 58; *Mozhuruiddin v. Gobind*, I. L. R., 6 Cal., 439.

2 16 Ch. D., 730.

3 *Kali Krishna v. Golam*, I. L. R., 13 Cal., 248; *Kali Kishen v. Golam Ali*, *ib.*, 3.

4 *Vithu v. Dhondi*, I. L. R., 15 Bom., 407; *Lalu v. Bai Motan*, I. L. R., 17 Bom., 631.

5 *Unhamma v. Vaikunta*, I. L. R., 1 Mad., 218.

6 *Haidri Begam v. Nathu*, I. L. R., 17 All., 42.

7 *Baba v. Vishvanath*, I. L. R., 8 Bom., 228; *Gopalrao v. Kishor*, I. L. R., 9 Bom., 527; *Mayavanjari v. Nimini*, 2 Mad. H. C., 109.

8 *Vithu v. Dhondi*, *supra*.

9 *Prannath v. Madhu*, I. L. R., 13 Cal., 96.

10 *Subba Pai v. Nagappa*, I. L. R., 12 Mad., 353; *Abdulla Rawutan v. Subbarayyar*, I. L. R., 2 Mad., 347; *Faidal v. Parakal*, 1 Mad. H. C., 13.

11 *Ishan Chunder v. Shama Churn*, I. L. R., 10 Cal., 41; *Haidri Bejam v. Nathu*, I. L. R., 17 All., 45.

As regards the law of limitation in reference to the suit which may be brought by the landlord insisting on a forfeiture, article 143 furnishes the rule which has to be applied. Time runs against the landlord from the date when the forfeiture is incurred, although his determination to avail himself of it may have accrued at a later date. It rests with him to decide whether he will take advantage of the forfeiture, and if he ignores the forfeiture he may still recover on the expiration of the term; for the conduct of the tenant does not by itself determine the tenancy or make his holding adverse, unless it amounts to an ouster of the landlord.¹ There are however cases in which it has been held that a tenant claiming a higher right than he really possesses, *e.g.*, a right to hold at a uniform rent or as a permanent tenant, may through the operation of the law of limitation, acquire that right.³ In cases governed by the Bengal Tenancy Act it has been held that forfeiture as a mode of determining the tenant's right of occupation is excluded; but it is otherwise in Bombay in cases governed by the Land Revenue Code.⁴

Note 5. (h) A notice duly given is one given at the proper time and place, and properly served according to the provisions of section 106 so far as they are applicable.

112. A forfeiture under section one hundred and [1] eleven, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Waiver of forfeiture.

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the [2] institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

1 *Ittappan v. Manavikrama*, I. L. R., 21 Mad., 153, 159, 164; *Bejoy Chunder v. Kally Prosonno*, I. L. R., 4 Cal., 327; *Tiruchurna v. Sanguvien*, I. L. R., 3 Mad., 118.

2 *Gopalrao v. Mahadevrao*, I. L. R., 21 Bom., 394; *Maidin Saiba v. Nugapa*, I. L. R., 7 Bom., 96; *Dinomoney Dabea v. Moosomdar*, 12 B. L. R., 232.

3 *Dhora v. Ram Jewan*, I. L. R., 20 Cal., 101; *Debiraddi v. Abdul*, I. L. R., 1 Cal., 196.

4 *Venkaji v. Lakshman*, I. L. R., 20 Bom., 354.

Commentary.

Note 1. This section is in accordance with the law laid down in England. The general rule is that if a lessor, knowing that a forfeiture has been incurred by the breach of any covenant, does any act whereby he acknowledges the continuance of the tenancy at a later period, he thereby waives such forfeiture.¹ As, on the one hand, there is no forfeiture until the lessor does some act showing his intention to determine the lease, so, on the other hand, mere inaction does not constitute waiver. The case of a lessor entitled to insist on a forfeiture is like that of a person on whom a fraud has been practised. The question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract, or has he elected to avoid it, or has he made no election?² The lessor has a similar election, and so long as he has not used it he retains the right to decide either way,

"The principle running through all the cases as to what is an election is this—
 "that where a party in his own mind has thought that he would choose one of two
 "remedies, even though he has written it down on a memorandum, or has indicated
 "it in some other way, that alone will not bind him; but so soon as he has not only
 "determined to follow one of his remedies, but has communicated it to the other
 "side in such a way, as to lead the opposite party to believe that he has made that
 "choice, he has completed his election and can go no further; and whether he has
 "intended it or not—if he has done an unequivocal act—I mean an act which would
 "be justifiable if he had elected one way and would not be justifiable if he had
 "elected the other way—the fact of his having done that unequivocal act to the
 "knowledge of the persons concerned is an election."³

The rent demanded or accepted must of course be rent falling due after the forfeiture.⁴ Such an acceptance, notwithstanding that it was made under protest or without prejudice to the right of forfeiture, operates as a waiver.⁵ Where a waiver has thus taken place, there is no determination of the lease, and therefore no case arises for the application of section 116. Although there may be no waiver, the effect of which is that the right to forfeiture is altogether extinguished, there may be circumstances which make it inequitable to insist absolutely on the forfeiture. For instance, where by the terms of his lease the lessee was bound to repair the premises within six months of notice being given by the lessor and on default a power of re-entry was reserved, and, notice having been given on the 22nd October 1874 by the lessor,

1 Woodfall's Landlord and Tenant, 12th ed., p. 298.

2 Clough v. London & N. W. Railway Co., L. R., 7 Ex., p. 35.

3 Scarf v. Jardine, 7 App. Cas., p. 360.

4 Kristo Nath v. Brown, I. L. R., 14 Cal., 176.

5 Davenport v. The Queen, I. L. R., 3 App. Cas., 115; but see Croft v. Lumley, 6 H. L. C., pp. 713, 744; Kali Krishna v. Fuzle Ali, I. L. R., 9 Cal., 843.

the lessee offered to sell his interest in the lease and proposed accordingly to defer the execution of the repairs; on its appearing that the lessor acceded to this suggestion and carried on negotiations for the sale until the 31st December, it was held that, although there was no waiver of the notice and the lessor was still entitled to insist on having the repairs executed, the conduct of the parties in entering upon the negotiations had made it inequitable that the exact period of six months should be counted against the lessee as the period within which the repairs should be executed, and the operation of the notice was held to be suspended until the date when the negotiations were broken off.¹

As in other cases where a person has a right of election, there can be no election by the lessor in this case unless he has knowledge of the circumstances entitling him so to elect.

Note 2. For this proviso there is also authority in the English cases.² Where the breach is of a continuing nature, *e.g.*, of a covenant to keep the premises in repair, to keep them insured or not to use them in a particular way, the waiver of any forfeiture up to a certain day is no defence to a suit for ejectment founded on a subsequent breach.³ It cannot be supposed that the common law doctrine of the waiver of one breach, operating as an entire dispensation from the covenant, obtains here. For cases to which English law is applicable, Act XXVIII of 1868 is in force.

113. A notice given under section one hundred and eleven, clause (*h*), is waived, with the express or implied consent of the person to whom it is given, by an act on the part of the person giving it showing an intention to treat the lease as subsisting.

Waiver of notice
to quit.

Illustrations.

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

Commentary.

By consent of the parties the tenancy may be continued after the expiration of the time named in the notice. In illustration (*a*) the

¹ Hughes, *v.* Metropolitan Railway Co., 2 App. Cas., 439.

² Dumphor's Case, 1 Smith's L. C., 3th ed., p. 43.

³ Woodfall's Landlord and Tenant, 12th ed., p. 300.

consent is evidenced, on the one hand, by the payment of rent and the continuance in possession, on the other by the acceptance of rent by the landlord and his suffering the tenant to hold over. In illustration (b) there is on the tenant's part the holding over, and on the landlord's the giving of the second notice. In order that the acceptance of rent should be evidence of waiver, the rent accepted must have become due subsequently to the expiration of the notice, and not before or on its expiration.¹ According to English law it is a new tenancy which arises on the expiration of the notice which is waived, and therefore a surety who has guaranteed the payment of rent under the original tenancy will cease to be liable.²

114. Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

Commentary.

This section puts on a definite footing the power of the Court to relieve against forfeiture for non-payment of rent. The power which the Courts have hitherto exercised, and may still exercise in the case of leases falling within section 117, on such conditions as have appeared to them equitable in each particular case,³ will now, at least in respect of leases made after the 1st of July 1882, have to be exercised on the terms laid down in the section.

1 Woodfall's Landlord and Tenant, 12th ed., p. 293.

2 Tayleur v. Wildin, L. R., 3 Ex., 303; see Holme v. Brunskill, 3 Q. B. D., 495.

3 Cutenho v. Souza, 1 Mad. H. C., 15; Ramanadan v. Srinivasa, I. L. R., 2 Mad., p. 83; Kottal Uppi v. Edavalath, 6 Mad. H. C., 258; Narayana v. Narayana, I. L. R., 6 Mad., 327, where it is observed that a contract, made before the Act came into force, cannot be affected by its provisions; Subbaraya v. Krishna, ib., 159; Vaguran v. Bangayyengar, I. L. R., 15 Mad., 125; Timmarasa v. Badiya, 2 Bom. H. C., 70; Krishnasawmy v. Natal Emigration Board, I. L. R., 17 Mad., 216.

115. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees or relief against the forfeiture is granted under section one hundred and fourteen.

Commentary.

The section proceeds on the principle that a man is not permitted to derogate from his own grant. The lessee therefore cannot by surrendering his lease affect the interests which he has created in favour of sub-lessees. Apart from this principle, inasmuch as there is no privity of estate between the lessor and an under-lessee, the determination of the latter's interest is the necessary consequence of the legal determination of the lease by whatever act or event that may be brought about. For instance, the under-lessee's interest is determined by a notice duly given to the lessee only in cases where the lessee's interest is so determinable. But a voluntary surrender by the lessee stands on a different footing. It operates as an assignment to the lessor of the surrenderor's interest, but does not necessarily extinguish that interest for all purposes. Accordingly if a zemindar accepts the relinquishment of a *patni* he places himself in the position of an assignee of the *patnidar*, and in no better position, as regards the subordinate interests which the *patnidar* has created.¹ In effect the under-lessee is, in case of a voluntary surrender, no more prejudiced by it than an assignee of the lease would be.

A forfeiture involving action *in invitum* taken by the lessor is entirely distinguishable from a surrender which involves consent on the part of the lessee. The distinction is thus explained by Mellish, L.J. :—

"It is a rule of law that if there is a lessee, and he has created an under-lease,

¹ *Judoonath v. Schoene, Kilburn & Co., I. L. R., 9 Cal., 671; David v. Sabia, [1893] 1 Ch., 523; Timmappa v. Rama, I. L. R., 21 Bom., 311.*

"or any other legal interest, and if the lease is forfeited, then the under-lessee, or the person claiming under the lessee, loses his estate as well as the lessee himself: but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him. If the question arose between the under-lessee and the landlord, the moment the surrender was produced, and it appeared in Court that there was a surrender of the estate, I have no doubt that a Common Law Court must necessarily hold that the landlord had waived all right to forfeiture by accepting a surrender. It would not be determined upon equitable grounds, but it would be a purely legal question; that is to say, although there might have been a right to claim a forfeiture if the landlord had chosen to insist on it, yet he, *de facto*, not coming in under a forfeiture, but under a surrender if he then brought an action of ejectment against the under-lessee, the moment the surrender was produced the action must in my opinion fail, and the under-lessee would be entitled to keep his estate."¹

It is suggested that in the second paragraph 'lessor' is wrongly printed instead of 'lessee.' The exception must be intended to refer to those cases in which ostensibly there has been a forfeiture but in reality a surrender has been effected.

116. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

Effect of holding over.

Illustrations.

(a) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house, and pays the rent to A. C's lease is renewed from month to month.

(b) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Commentary.

On the determination of the lease, the lessee is bound to surrender possession to the lessor, and on default he or his under-tenant may be ejected. But if the lessor consents to his holding over by accepting rent

or otherwise, a new tenancy arises by presumption, which may be a tenancy from year to year or from month to month, according to the nature of the property.¹ The presumption may be displaced by evidence of an agreement inconsistent with it. The section does not in terms say that the conditions contained in the original lease are to be treated as part of the renewed lease, but it was doubtless intended to follow in that respect the English rule. According to that rule where a tenant for a term of years holds over after the expiration of the term and pays rent, a tenancy from year to year is created upon the same conditions as those contained in the expired lease, so far as they are applicable to, and not inconsistent with, a tenancy from year to year.² In such cases the new tenancy is deemed to have commenced at the same time of year as the original tenancy, and notice to quit must be given accordingly. If on the death of the landlord a tenant holding over continues in possession and pays the same rent to the landlord's successors, it is evidence that the latter has assented to the tenant continuing on the terms of the original lease.³ Here it seems that the lessee of a house for a term of years would, if he paid rent after the expiry of the term, be treated as a tenant from month to month and would be entitled to fifteen 'days' notice expiring at the end of any month of his tenancy.⁴ If there is no evidence of consent on the lessor's part to the continuance of the lessee's possession after the determination of the lease, the lessee becomes a tenant-at-sufferance, that being the phrase applicable to one "who comes in by right and holds over without right." The position of a tenant-at-sufferance in English law can best be described in negative terms. He has a bare possession without right. He has no right to notice to quit before he is ejected by the lessor. His tenancy cannot be transferred by him to another, nor can it pass on his death; at the same time he is not precisely in the position of a trespasser as would be the person who claimed under him by transfer or succession. Not being in the position of a trespasser he cannot avail himself of his possession as adverse to the lessor, and therefore, but for the Statute of William, time did not run in his favour for the purpose of barring his lessor's claim. On this point the law in this country is not clear. The question is not whether the possession of a tenant-at-sufferance is

1 See section 106. Similarly an intended lessee entering under an agreement for a lease, see *Walsh v. Lonsdale*, 21 Ch. D., 1.

2 *Woodfall's Landlord and Tenant*, 12th ed., p. 715; *Sayaji v. Umaji*, 3 Bom. H. C., (A. C.), 27.

3 *Cornish v. Stubbs*, L. R., 5 C. P., 334.

4 *Nocoordas v. Jewraj*, 12 Beng. L. R., 263.

adverse or not, but whether such a person is a tenant within the meaning of the 139th Article to Schedule II of the Limitation Act. According to that article the twelve years' period begins to run from the moment when the tenancy is determined. Under this Act a lease for a term of years is determined by efflux of the time limited thereby. Unless it is to be supposed that a lessee holding over without his lessor's consent is still a tenant within the meaning of the 139th article, it is clear that time must run in his favour from the date of the expiration of the term. In the Bombay High Court the opinion has been expressed that on the expiration of a lease for a term the tenancy is terminated. It was not necessary to decide the point because the tenant-at-sufferance had died and the possession of the defendant who took as his son was undoubtedly adverse.¹ The other view was taken in an earlier Madras case, where it was held that notwithstanding the determination of the lease the tenancy still subsisted and therefore the landlord's right to sue was not lost.² The point does not seem to have arisen in the other Courts. In the case of a ryot it has been held in Bengal that it makes no difference whether he holds under a *patta* or not, for the tenancy does not come to an end on the expiration of the term fixed in the *patta*.³

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

Commentary.

A lease of a coffee garden has been held not to be a lease for an agricultural purpose.⁴

1 *Kanthappa v. Seshappa*, I. L. R., 22 Bom., 896.

2 *Adimulam v. Pir Ravuthan*, I. L. R., 8 Mad., 424.

3 *Chaturi v. Makund*, I. L. R., 7 Cal., 710; see *Madho v. Tekait Ram*, I. L. R., 9 Cal., 411, 417.

4 *Kunhayen v. Mayan*, I. L. R., 17 Mad., 98.

CHAPTER VI.

OF EXCHANGES.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an “exchange.”¹

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Commentary.

This chapter, dealing with moveable as well as immoveable property, supplies an omission in the Contract Act, which does not treat of the contract of barter. According to section 77 of that Act sale is the exchange of property for a price, and according to section 54 of this Act sale is a transfer of ownership in exchange for a price. By ‘price’ is meant money only,² for “if there is an agreement that I shall sell you my horse for one of your books, the agreement does not constitute a sale, but a different kind of contract, namely, an exchange.”³ Blackstone⁴ says that the same rules of English law apply to contracts of sale and exchange, and this chapter also assimilates them, except for the provisions of section 119. The distinction however between sale and exchange remains a substantial and not merely formal one. An agent to sell may not barter the goods of his principal;⁵ and where two persons agreed to barter goods and one of them failed for three years to perform his part of the contract, Pollock, C.B., held that an action for goods sold and delivered did not lie against him, saying that “no mere lapse of time will turn a contract of barter into a contract for goods sold.”⁶

1 See *Queen-Empress v. Appava*, I. L. R., 9 Mad., ; and note 141 to section 54.

2 Pothier on Obligations, No. 6.

3 1 Bl. Com., 446, 447.

4 *Guerreiro v. Peile*, 3 B. & Ald., 616; *Barbe v. Parker*, 1 H. Bl., 287.

5 *Harrison v. Luke*, 14 M. & W., 139; see also *Forsyth v. Jervis*, 1 Stark., 437, in which Ellenborough, C.J., held in the case of sale of goods to be in part paid for by the delivery of goods of a stipulated value, that upon the refusal of a purchaser to pay for them in that mode a contract resulted to pay for them in money.

The definition of exchange given here is taken from the New York Civil Code, section 903. Money may be exchanged for money, and any other property,¹ except what is not transferable,² may be the subject of barter; the two things need not be of the same nature, and the interest which the parties have in them, need not be identical. It is otherwise according to English common law.³ If money is given on one side it must be given on the other, for otherwise there is a sale and payment of a price. It would seem that, where one piece of land is exchanged for another and the transfer is not effected by mere delivery, there must be two registered instruments, each in consideration for the other.⁴ The necessity for a registered instrument must depend on the value and nature of the property transferred to one party or the other in pursuance of the exchange.

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

Commentary.

This section may be compared with section 109 of the Contract Act. It affirms in distinct terms not to be found in Chapter III, that each party warrants his title to the thing which he transfers. There is a similar warranty implied in the exchange of the English common law, according to which a defect of title does not by itself defeat an exchange. And so here, the section would not apply unless there was eviction or actual deprivation.⁵

Where wire was given by the plaintiff in exchange for a bill of exchange on the terms that the plaintiff was not to have recourse to the defendant in case of the bill not being paid, there was in effect 'a contract to the contrary,' and it was held that, although the plaintiff on proving that the bill was valueless might possibly recover in an action

¹ See *Empress v. Joggeesson*, I. L. R., 3 Cal., p. 382.

² See section 6.

³ *Smith's Law of Real and Personal Property*, p. 627.

⁴ *Davidson's Precedents*, Vol. V., p. 77. It has been held that by Hindu law an exchange of lands followed by possession need not be evidenced by writing, *Mantens v. Chekuri*, 1 Mad. H. C., 100.

⁵ *Smith's Law of Real and Personal Property*, p. 629.

for trover or deceit. he could not recover in an action for goods sold and delivered.¹

It is to be observed that the right to compensation is given to the person deprived of the thing he received, and not as in section 109 of the Contract Act, to "any person claiming under him." Whether it is intended to restrict the right to the party only or the party and his heirs, and within what limits of time the right may be exercised, is not explained. It is apprehended that it cannot at any rate be exercised against purchasers for value without notice.

120. Save as otherwise provided in this chapter,
 each party has the rights and is subject to
 the liabilities of a seller as to that which
 he gives, and has the rights and is subject
 to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

Commentary.

This section is taken from the New York Civil Code, section 905. When the subject of the exchange is immoveable property, the rights and liabilities of the transferor and transferee will be regulated by the provisions of section 55 of this Act, and section 18 among others of the Specific Relief Act will be applicable; when it is moveable property those of Chapter VII of the Contract Act, including the sections relating to warranty of quality, will apply. In an English case, where a certain quantity of Champagne was exchanged for an equal quantity of Burgundy supposed to be of equal value and the Burgundy turned out to be in bad condition, it was held that no action would lie in the absence of fraud or express warranty. The maxim *caveat emptor* was applied.² Here the plaintiff would have had relief if he had shown that the Burgundy was unsound.

121. On an exchange of money, each party thereby
 warrants the genuineness of the money
 given by him.

Exchange of money.

¹ Read *v. Hutchinson*, 3 Camp., 352; see also *In re Michell*, I. L. R., 3 Cal., 379, in which it was held that a Government currency note is not 'goods' within the meaning of the Contract Act, "as being legal tender for the amount expressed therein."

² *Le Neuville v. Nourse*, 3 Camp., 351.

Commentary. ^a .

With this section may be compared *New York Civil Code*, section 906. In transactions of any kind where money passes as such, it is presupposed that the money is good, and the payment of false money by the purchaser of goods is no payment. So if a man pays money for bills and they turn out to be forged, the money may be recovered.¹ And conversely, where a man deposited bank notes with the defendants and the bank stopped payment before the notes were presented, it was held that he could not recover their value.² In such cases there is a total failure of consideration.³

1 *Jones v. Ryde*, 5 Taunt., 487; *Eicholtz v. Banister*, 17 Q. B., (N. S.), 703.

2 *Timmins v. Gibbins*, 18 Q. B., 722.

3 *Id.*, p. 725 *per* Campbell, C.J.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing move- [1]
able or immoveable property made volun-
"Gift" defined. tarily and without consideration, by one
person, called the donor, to another, called the donee, and
accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of [2]
the donor and while he is still capable of
Acceptance when giving.
to be made.

If the donee dies before acceptance, the gift is void. [3]

Commentary.

Note 1. The first condition of a gift, as distinguished from other alienations, is that it should be an act of mere liberality on the giver's part in this sense, that, whatever may be his motive, the act is not done in obedience to any legal obligation, nor with the purpose of placing the donee under any legal obligation. It is an act therefore which imports a clear gain to the donee, an accession to his property which he could not have demanded and for which he cannot be compelled to make a return. Where the manager of a bank stole from it certain bonds and sold them and afterwards restored them to their place with others of a like kind and value, it was held that the bank was not in the position of a donee, inasmuch as the delivery of the bonds was a mere restitution of the property which the bank had a right to demand. It was immaterial that the bank did not know that the bonds had been stolen or restored. The expression 'voluntarily and without consideration' is taken from the New York Civil Code, section 500. In the nature of things anything may be given, whether tangible or not, and one who remits a debt, wholly or in part, or surrenders any right in *re aliend*, makes a gift equally with one who makes a present in money. The chapter is, however as it would seem, confined to gifts of tangible property, moveable or immoveable. The subject-matter of the

1 London and County Banking Co. v. London and River Plate Bank, 21 Q. B. D.

gift must be in existence,¹ and it must not be one of the things declared by section 6 to be incapable of transfer. In the absence of evidence of a contrary intention, all the interest which the donor is at the time capable of passing in it and also its legal incidents will pass to the donee by the deed of gift.² Evidence of such contrary intention may of course be gathered from the rest of the instrument.³ Where a wife having received a banker's draft for a legacy payable to her separate use indorsed the draft and handed it over to her husband, and he had the amount placed to his deposit-account with his bankers and shortly afterwards died, it was held on these facts taken with the widow's evidence that she did not intend to make a gift of the money to her husband and that the property had not passed to him.⁴

Note 2. The donee must be a person in actual existence, or at least a child in embryo who afterwards comes into actual existence,⁵ and there must be acceptance on his part of the thing given. Gift is generally considered to share the nature of 'contract' in so far as it is a transaction to which the consent of two persons is required. Possession moreover, which is part of the transaction, involves a consenting mind in the person taking it. It would not however be a correct statement of English law to say that there could be no complete gift without the donee's consent; for there the accepted rule is that, when once the donor has done his part in transferring the property, it vests in the donee subject only to his dissent. It is not positive consent, but absence of dissent, which is required to make a gift complete and irrevocable. Thus where the plaintiff transferred £6,000 consols into the joint names of herself and the defendant with the intention that the defendant should have them after her death, and the defendant knew nothing of the transfer until he was called upon to concur in re-transferring the stock to the plaintiff, it was held that the transfer was complete and could not be revoked, notwithstanding the want of prior acceptance by the defendant.⁶ There is a general presumption that a man accepts what is purely beneficial to him. A man may fairly be presumed to assent to that to which he in all probability would

1 See note to section 6; and section 124.

2 See section 8; and see *Chattar Lal v. Shewukram*, 5 Beng. L. R., 125; *Srimati Pabitera v. Damudar*, 7 Beng. L. R., 697.

3 *Kalidas v. Kanhaiya Lal*, 11 Cal. L. R., 11.

4 *Green v. Carlill*, 4 Ch. D., 882.

5 *Jatindra Mohan Tagore v. Gauendra Mohan Tagore*, 9 Beng. L. R., p. 397, and see section 5, and note thereto.

6 *Standing v. Bowring*, 31 Ch. D., 232; see *Bai Kushal v. Lakhma*, 11 L. R., 7 Bom., p. 452.

assent if the opportunity were given him.¹ No man however is obliged to accept a gift. If therefore one desires to make another a present, and the intended donee declines to take it as a present, saying he will accept it as a loan only, and the intending giver acquiesces, there would be a loan and no gift.² On the other hand, if the giver insists on the thing being kept as a present or not at all, and the recipient acquiesces, there would be a gift and not a loan.³ In view of the express words used in this section, it may be doubted whether such a case as *Standing v. Bowring*,⁴ above stated, would, if dealt with under the Act, be decided in the same way. And the question may well arise, because, as provided in the next section, the transfer may be made by a registered instrument without delivery of possession, and therefore need not necessarily be brought to the knowledge of the intended donee. If property of an onerous nature, e.g., shares in a company on which calls may be made, or an interest under a lease is comprised in one gift with property of a purely beneficial character, the donee cannot accept the latter and disclaim the onerous property; for *prima facie* the intention of the donor is that the gift should be accepted as a whole or not at all.⁵

Acceptance, which is always necessary to constitute a complete gift, must be distinguished from receipt which is
Completion of title. only necessary in the case of moveable property, and when in the absence of a registered instrument. Receipt and possession of property is often evidence of acceptance, but it is not the same thing; for a man may receive a thing for the purpose of seeing whether he will accept it or not. Receipt for such a purpose can no more amount to acceptance in the case of a gift than it can in the case of goods similarly received by a buyer.⁶ The importance of the distinction between gifts and alienations made for consideration becomes

1 *Xenos v. Wickham*, L. R., 2 H. L., 315, *per* Willes, J. The presumption holds good even though the gift is of an onerous nature, *Siggers v. Evans*, 5 Bl. & Bl., 367; s.c., 24 L. J., Q. B., 305; *London and County Banking Co. v. London and River Plate Bank*, 21 Q. B. D., 535; see however *per* Cave, J., *The Queen v. Ashwell*, 16 Q. B. D., p. 203.

2 *Hill v. Wilson*, L. R., 8 Oh., 888.

3 *Ib.*, p. 896.

4 31 Ch. D., 282. So under the Contract Act it is only an accepted proposal that makes a promise [section 2 (b)], and therefore even a promise to make a gift, valid according to section 25 (1), must apparently be accepted by the promisee before it becomes binding.

5 *Guthrie v. Walrond*, 22 Ch. D., 573; as to gift of leaseholds see *Price v. Jenkins*, 5 Ch. D., 619.

6 See Contract Act, section 118; and *Dharmodas v. Nistarini*, I. L. R., 14 Cal., 446, where there was acceptance but no delivery.

apparent when the alienation is questioned by subsequent purchasers or creditors of the alienor (see section 53), or when, the alienation being incomplete, it is sought to compel the alienor to carry it out or give effect to it. In accordance with the general rule that the Courts will not enforce an agreement made without consideration, the law does not give assistance to the volunteer who claims to have some act done by the grantor to make the gift complete. If a gift is intended and something remains to be done by the donor to make it legally complete, the transaction is inoperative and the intended donee has no remedy. Thus in the case of railway stock, a transfer in the books of the company being necessary to make a complete assignment, the mere delivery of the certificates does not give the intended donee a valid title against the donor, his executors or his creditors.¹ But there is another way in which a person may without consideration transfer property to another, namely, by constituting himself or some third person trustee of the property for that other.

"A man may transfer his property without consideration in one of two ways: "he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case "the person who by those acts acquires the property takes it beneficially or on trust "as the case may be; or the legal owner of the property may, by one or other of the "modes recognized as amounting to a declaration of trust, constitute himself a "trustee and without an actual transfer of the legal title may so deal with the property as to deprive himself of the beneficial ownership and declare that he will "hold it from that time forward in trust for the other person."

The two transactions must be kept distinct, and where there is an intention to give not fully carried out, effect cannot be given to it as a declaration of trust. For the latter an expressed intention to hold the property as a trustee on behalf of another is required, and no actual change of possession is necessary, "whereas words of present gift show "an intention to give over the property to another, and not retain it in "the donor's hands for any purpose, fiduciary or otherwise." In a recent case the facts proved were that a person (since deceased) handed to her executor a promissory-note signed by her, desiring him to keep it till her death and then give it to her servant, E. H., if she should so long remain in her service. It was held that the deceased had done what was necessary to show that she intended her executor to hold the promissory-note as a trustee for E. H. on the condition mentioned.² The

1 Moore v. Moore, L. R., 18 Eq., 474; as to the voluntary assignment of actionable claims see note to sections 130 and 131.

² Richards v. Delbridge, L. R., 18 Eq., 11, 14.

3 Shenstone v. Brock, 36 Ch. D., 541; Cochrane v. Moore, 25 Q. B. D., p. 73.

doctrine involved in the English cases has been recognized by the High Court of Bombay.¹ But as is observed by that Court the doctrine is one which, "when it is sought to establish it by oral evidence, requires "to be applied in this country with the greatest caution; and we cannot "doubt that to allow an acknowledgment of trust to be established by the "evidence of interested parties, speaking as to conversations which took "place seventeen years ago without the corroboration derived from other "evidence pointing irresistibly in the same direction, would be to introduce a most dangerous mode of appreciating evidence in this country "and would offer a direct encouragement to perjury.² Owing to the frequency of *benami* transactions, no presumption in favour of an intention to benefit another arises from the mere fact of property being bought, or an account opened in his name. There must be clear evidence of intention on the part of the person from whom the funds proceed to constitute himself a trustee or divest himself of all beneficial interest in the property.³

Note 3. The transaction must be complete as well on the donee's as on the donor's part while they are still alive. But in England it has been held that if the intention of both parties has, by the default of a third party, been prevented from taking effect during the donor's lifetime, the gift is none the less good; as where money was given in the form of a cheque and the banker wrongfully refused to cash it.⁴

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of moveable property [2] the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods [3] sold may be delivered.

1 *Merbai v. Perozbai*, I. L. R., 5 Bom., 269; *Jamsetji v. Sonabi*, 2 Bom. H. O., 130; see also *Golam Yassin v. Official Trustee of Bengal*, I. L. R., 8 Cal., 887; *Vencatachella v. Thathammal*, 4 Mad. H.O., 460.

2 *Hirbai v. Jan Mahomed*, I. L. R., 7 Bom., p. 251; *Bhaskar v. Sarasvatibai*, I. L. R., 17 Bom., 486; *Ganapati v. Savithri*, 1 I. R., 21 Mad., 10.

3 *Ashabai v. Haji Tyeb*, I. L. R., 9 Bom., 115; *Mayne's Hindu Law*, § 401.

4 *Bromley v. Brunton*, L. R., 6 Eq., 275; see also *Man Bhari v. Nannidh*, I. L. R., 4 All., 40; and *Burge's Colonial and Foreign Laws*, Vol. II, 144

Commentary.

Note 1. It is first to be observed that this section applies to transactions with Hindus, but does not apply in districts in which the Registration Act is not in force.¹ There is no very material difference between the language of this section and that of section 54. If therefore it is right to suppose that each of the modes of effecting a sale denoted in that section is sufficient in itself, and that possession is not necessary when a registered instrument has been executed, it would seem that the same view would hold good with regard to this section in respect of gifts. In that view delivery of possession is not necessary to make a valid gift, whether of land or of moveables. In the former case a registered instrument, attested by two witnesses, is the sole mode prescribed. Instruments of gift of immoveable property are among the documents, registration of which is compulsory under section 17 of the Registration Act. In a case decided irrespectively of the Act, where a Hindu purported to make a gift of a house and executed a registered deed of gift, but the transaction was unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title or permitting the donee to receive rents or other like act, it was held that there was no complete gift notwithstanding that the deed of gift was registered.² But where a gift of land made in 1883 was in question the same Court held that, while delivery of possession was not necessary, such gift could be effected only by a registered instrument.³ In a recent Madras case it was held that the registration of the deed in order that it should be efficacious must be effected with the donor's consent and that therefore a deed of gift registered compulsorily cannot avail against a duly registered conveyance of a later date.⁴ This decision amounts to saying that the provisions of the law of registration regarding compulsory registration do not affect gifts, but nothing in the Act to justify that conclusion is indicated. A particular form of transfer being now prescribed by law, a gift made in any other form will be inefficacious,

1 See Act III of 1885—the Amendment Act—section 3, which provides that this section shall be read as supplemental to the Indian Registration Act, 1887, *ante* p. 25. By section 32, Act XIII of 1859, this section is extended to every cantonment in British India.

2 *Dagai Dabee v. Mothura Nath Chattopadhyaya*, I. L. R., 9 Cal., 854; *Harjivan Anandram v. Naran Haribhai*, 4 Bom. H. C., (A. C.), 31; *Bank of Hindustan v. Premchand Raichand*, 5 Bom. H. C., (O. C.), 83.

3 *Dharmodas v. Nistarini*, I. L. R., 14 Cal., 446; see *Mannu Singh v. Umadat*, I. L. R., 12 All., p. 527.

4 *Ramamirtha v. Gopala*, I. L. R., 19 Mad., 438.

as well between donor and donee as between the donee and persons holding adversely to him and the donor.¹

Note 2. In the case of moveables, a gift may be effected either by a registered instrument executed by the donor or by delivery. Delivery of possession is not necessary when such instrument has been executed.² In English law an analogous alternative is presented.³ A gift of chattels may be made either verbally with delivery, or by means of a deed without delivery. Where there is a deed the absence of possession given to the donee is only important as evidence of fraud against third persons.

Note 3. The delivery of moveables required is that described in section 90 of the Contract Act. There seems to be no reason why, when the subject-matter of the gift is in the donee's hands before the gift is made, continuance of possession should not be held sufficient. Where one said to another, "I will give you the plate of mine which you have," it was held that there was no gift, not because the plate was already with the intended donee, but because there was a promise to give rather than a gift.⁴ And so in the case of furniture belonging to the claimant's father, but kept in the house occupied by her and her husband, it was held that the gift was complete without any manual delivery or removal of the furniture. There were words of present gift by the father, she was living in the house and using the furniture, and nothing more was required to transfer the possession from her husband to her.⁵ Similarly in a Bombay case where one of the donor's daughters was in actual occupation at the time of the gift, it was held that a declaration of gift in favour of all his daughters, made by the donor and acquiesced in by her, was sufficient to constitute a valid gift to them.⁶ If the property is in the hands of a third person, a request to such person by the donor to deliver, is the only delivery possible.⁷ In *Cochrane v. Moore*⁸ it was left undecided

1 See *Merbai v. Perozbai*, I. L. R., 5 Bom., p. 277; *Kalidas v. Kanhaya Lal*, I. L. R., 11 Cal., p. 121; s.c., L. R., 11 I.A., 219.

2 *Dharmodas v. Nistarini*, I. L. R., 14 Cal., 446.

3 1 Bl. Com., 441; *Irons v. Smallpiece*, 2 B. & Ald., 551; commented on in *Doe d. Seebkristo v. E. I. Co.*, 6 Moo. I. A., 278, re-affirmed in *Cochrane v. Moore*, 25 Q. B. D., 57. As to the effect of a deed in India, see *Kaliprasad Tewari v. Raja Sahib Prahlad Sen*, 2 Beng. L. R., (P. C.), 111.

4 *Shower v. Pilok*, 4 Ex., 478, cited in 1 Sm. L. C., 9th ed., 166; *Richer v. Voyer*, L. R., 5 P. C., p. 477; *In re Ridgway*, 15 Q. B. D., 447; *Cain v. Moon*, [1896] 2 Q. B., 283.

5 *Kilpin v. Ratley*, [1892] 1 Q. B., 582. • •

6 *Bai Kushal v. Lakhma*, I. L. R., 7 Bom., 452. •

7 *Shaik Ibham v. Shaik Suleman*, I. L. R., 7 Bom., p. 150. • •

8 25 Q. B. D., p. 73.

whether the undivided fourth part of a horse admits of delivery, and whether a letter written by the donor to the custodian of the horse, informing him of the gift of one-fourth of it, was sufficient delivery to perfect the gift. Where the directors of a railway, having resolved to give one of their servants a bonus in consideration of his good services, transferred the necessary sum to the district paymaster and no further step was taken, it was held that the money could not be attached as the property of the servant, because the gift had never been completed.¹ The recognised mode of transferring Government promissory notes is by indorsement, and without indorsement a gift of such property is therefore incomplete.² Accordingly where the defendant was in possession of such notes, standing in the name of the plaintiff's testator, and claimed to hold them in virtue of a gift made by him, it was held that the plaintiff as executor was entitled to recover them, inasmuch as the gift was incomplete.³ The authority cited for this decision was *Shillito v. Hobson*.⁴ There the holder of an equitable mortgage, intending to make his nephew a present of it, simply handed over the deed deposited with him to his nephew, and the deed was claimed by the administrators of the donor after his death, it was held that, as, in the absence of an instrument under seal required by English law, there was no valid transfer of the equitable charge, the deed which was only an incident to it must be given up. Similarly, where the mortgagee by a letter addressed to the mortgagor relinquished his rights under the mortgage enclosing the mortgage-deed in his letter, and subsequently changed his mind and proceeded to enforce the mortgage, it was held that the release being without consideration and not made under seal was ineffective. The intention of the mortgagee, evidenced in writing the letter and handing over the deed, was not carried into legal effect, and the gift remained incomplete and was therefore unenforceable.⁵

Gift of existing
and future property.

124. A gift comprising both existing and future property is void as to the latter.

Commentary.

There can be no alienation of a thing which is not in existence, or does not belong to the person purporting to alienate it. At most the professed alienation in such a case can operate as a contract. As

¹ *Janki Das v. E. I. R. Company*, I. L. R., 6 All., 634.

² *Merbai v. Perozbai*, I. L. R., 5 Bom., 277.

³ *Khursedji v. Pestonji*, I. L. R., 12 Bom., 573.

⁴ 30 Ch. D., 396.

⁵ *Hancock v. Berry*, 54 L. T., N. S., 197.

however a promise to make a gift creates no legal obligation, it follows that a professed gift of future property can have no operation at all.¹

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several of whom one does not accept.

Commentary.

In other words, the shares of those who accept the gift are not increased by the share of him who refuses. As to the latter share the gift fails.² In the case of testamentary gifts to several persons jointly, if the gift to one of them fails by reason of his death or otherwise, the others take the whole property under section 93 of the Indian Succession Act. Whereas if a similar gift is made in words showing that the donees are to take distinct shares and not jointly, it is otherwise; in such a case if any legatee dies before the testator, his share of the legacy under section 94 of the same Act falls into the residue.

126. The donor and donee may agree that on the [1] happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

When gift may be suspended or revoked.

A gift may also be revoked in any of the cases (save [2] want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to [3] affect the rights of transferees for consideration without notice.

Illustrations.

(a) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's life-time. A may take back the field.

¹ See note to section 6, *ante* p. 29.

² Burge's Foreign and Colonial Laws, Vol. II., p. 144; compare Nandi Singh v. Sita Ram, L. R., 16 I. A., 44.

(b) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

Commentary.

Note 1. In Chapter II provision has already been made for trans-

Resumption of gifts. fers subject to conditions, section 21 among others referring to conditions precedent, and section 31 to

conditions subsequent. The 'event' in the present section not being designated as uncertain, it may be that other cases than those of conditions proper are here intended, and that the case of a gift to take effect, or to be annulled on the happening of an event which must happen, is also contemplated by the section.¹ A gift may be made on the condition that the donee is to perform certain services, or that in default his interest shall be determined. The continued performance of the services is then made a condition to the continuance of the tenure. But to assert that "whenever service enters into the motive or consideration for a grant, that the grant will become void if for any reason the service ceases to be performed," is, in the opinion of the Judicial Committee, a proposition far too wide.² In the case where this opinion was expressed, the grant had been made in part as a reward for the past services of the grantee in warding off the incursions of elephants, in part on account of future services of the same kind. It was held that the grant could not be resumed on the ground that there was no longer any occasion for the performance of the service; although, if the donee had wilfully failed in the performance of his duties, he might have been liable to forfeit the tenure. In the absence of a condition, the Government cannot any more than a private individual revoke a gift actually made;³ and when a gift is complete at the time when the actual transfer takes place, the parties cannot afterwards import a condition.⁴ Distinct from the case of a grant subject to a condition of service to be rendered is that of a grant of land as a remuneration for services. In the latter case, unless there has been a grant of an hereditary office, the land may be resumed when the services are no longer required.⁵

Where a promise is made contingent on the mere will of the promisor,

¹ See section 19.

² *Forbes v. Meer Mahomed*, 13 Moo. I. A., 438; s.c., 5 Beng. L. R., 529; *Kool-deep Narain Singh v. The Government of India*, 14 Moo. I. A., 247; see *Lakshmi v. Chendri*, 1 L. R., 8 Mad., 72.

³ *Collector of Ratnagiri v. Vyankatray*, 8 Bom. H. C., (A. C.), 1.

⁴ *Ram Surup v. Bela*, 1 L. R., 6 All., p. 321; s.c., L. R., 11 I. A., 44.

⁵ *Sanniyasi v. Sahur Zemindary* 1 L. R., 7 Mad., 268; *Mahadevi v. Vikrama*, 11 L. R., 14 Mad., 365; *Radha v. Budhu*, 1 L. R., 22 Cal., 938; *Bhimopaiya v. Ram-chandra*, 1 L. R., 22 Bom., 422.

and not on his doing some act, there is no legal promise.¹ A man is not bound to pay money if he has only promised to do so if he chooses. Here it is declared that a gift made contingent on the mere will of the giver is null and void. If such a provision is required it may be suggested that it would have found a more appropriate place among the general provisions in Chapter II. But it is difficult to see what practical use there is for it. If a man makes a gift reserving an absolute power of revocation, whether the gift is void or whether he may revoke it at his will, does not apparently make any difference as between the immediate parties to the transaction. In either case, subject to the law of limitation, he may recover the things as his own property. Only in the one case it would, on the power being exercised, have ceased to be the property of the donee; and in the other case the gift being void, it had never ceased to be that of the donor.

Note 2. If consent to a gift is caused by coercion, undue influence, fraud or misrepresentation the gift is voidable at the option of the party whose consent was so caused (section 19, Contract Act). The right to impeach a gift on the ground of fraud survives to the representatives of the donor; they cannot however avoid a gift which the donor himself without actually ratifying it has not chosen to retract.²

* In the absence of fraud or other special reason for setting aside the gift, the Courts will not undo the act of the giver merely because it was voluntary. His consent having been properly obtained, the law does not countenance him in changing his mind. "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, a Court of equity will not loose the fetters he hath put upon himself, but he must lie down under his own folly."³ Ordinarily it is for the donor to show that his consent was obtained by improper means.⁴ But there are some cases in which the presumption, that a person transacting business knew what he was doing and was not acting under undue influence, does not arise. Section 111 of the Evidence Act, providing for the case where there is a question of the good faith of a transaction between parties one of whom stands to

1 See Contract Act, section 31.

2 Mitchell v. Homfray, 8 Q. B. D., 587.

3 Cited in notes to Ellison, 1 W. & T. L. C., 6th ed., p. 353; see Abhaachari v. Rama Chandrayya, 1 Mad. H. C., 393. As to the case of gift by a devotee to a religious institution of which she became a member but which she subsequently left, see Allcard v. Skinner, 36 Ch. D., 145.

4 Henry v. Armstrong, 18 Ch. D., 648: see too as to burden of proof, Thakoor Deen v. Nawab Syed Ali, 13 Beng. L. R., 427; s.c., L. R., 1 L. &, 192.

the other in a position of active confidence, throws the burden of proving the good faith of the transaction on the party who is in the position of active confidence.¹ In the leading case of *Huguenin v. Baseley*,² a voluntary

Undue influence.

settlement, made by a widow in favour of a clergyman who had managed her affairs, was set aside on the ground of the spiritual ascendancy and undue influence obtained by the defendant over the mind of the plaintiff. Having regard to the relations existing between Baseley and the widow, Lord Eldon said:—"The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her as against those who advised her which, from their situation and relation with respect to her, they were bound to exert in her behalf." The relief is granted on "the general principle applying to all the variety of relations in which dominion may be exercised by one person over another."³ It lies on the party who occupies a position giving him any such influence over another to show that he has not in any dealing with him taken advantage of his influence, and that the other person has acted voluntarily and deliberately knowing the nature and effect of his acts.⁴ The absence of independent advice is one of the most important circumstances to be considered. Among such exceptional cases, in which the ordinary presumption of understanding and capacity does not arise, is the case of *purdanashin* women. "According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one and fully understood by the lady whose property is dealt with."⁵ Especially when she has had no legal assistance, the Court ought to be satisfied that she had the transaction explained to her, and knew what she was doing.⁶ On an issue of undue influence it has been said that the Court has to consider (a) whether the gift in question is one which a right-minded person might be expected

1 Compare Act VI of 1899, amending section 16 of the Contract Act.

2 2 W. & T. L. C., 6th ed., p. 597.

3 See *Lyón v. Home*, L. R., 6 Eq., 655; *Sital Prasad v. Parbu*, I. L. R., 10 All., 535; *Mannu Singh v. Umadat*, I. L. R., 12 All., 523.

4 *Hunter v. Atkins*, 3 My. & K., 113; Evidence Act, section 111.

5 *Thakoor Deen v. Nawab Syed Ali*, 13 Beng. L. R., p. 431; s.c., L. R., 1 I. A., p. 206.

6 *Ashgar Ali v. Delroos Banoo*, I. L. R., 3 Cal., 324; see too *Kamini Sundari v. Kali Prossunno*, I. L. R., 12 Cal., 225; s.c., L. R., 12 I. A., 215; *Mariam Bibi v. Sakina*, I. D. R., 14 All., 8; *Wajid Khan v. Ewaz Ali*, I. L. R., 18 Cal., 545, and *Rajabai v. Ismail*, 7 Bom. H. C. (O. C.), 27; *Rhodes v. Bate*, L. R., 1 Oh., 257.

to make, (b) is or is not an improvident act on the donor's part, (c) is such as to have required advice, if not obtained by the donor: and (d) whether the intention to make the gift originated with the donor.¹

In the absence of fraud, a gift will not be set aside on the ground of mere mistake unless the mistake is with respect to a matter on which the gift has been made conditional. In *Iumley v. Desborough*² the plaintiff filed his bill to impeach a voluntary settlement made by him in favour of his supposed wife. On his failure to prove fraud on the woman's part, the bill was dismissed. In another case³ a gift was made by will to a woman whom the testator in ignorance of the existence of her former husband had married, and by the same will another gift was made to a daughter of the same woman described as his step-daughter. It was held that the former gift failed on account of the woman's fraud, but that the gift to the daughter was valid. In a Bengal case,⁴ where the Privy Council refer to the case last cited, it is said:—

"The distinction between what is description only and what is the reason or 'motive of a gift or bequest may often be very fine, but it is a distinction which 'must be drawn from a consideration of the language and the surrounding circumstances. If a man makes a bequest to 'his wife A. B.', believing the person named 'to be his lawful wife, and he has not been imposed upon by her, and falsely led to 'believe that he could lawfully marry her, and it afterwards appears that the 'marriage was not lawful, it may be that the legality of the marriage is not essential 'to the validity of the gift. Whether the marriage was lawful or not may be 'considered to make no difference in the intention of the testator.'"

In the particular case, which was one of a deed of gift in favour of an adopted son, it was held on the construction of the deed that it was the donor's intention to give his property to the person named, as his adopted son, and that, as the adoption was invalid, the gift did not take effect. The case was distinguished from one in which a gift was made to an adopted son, with a direction that the testator's wives should perform the ceremonies according to the shastras, where, in reference to a contention that the gift had failed because both the widows had not performed the ceremonies, it was held that the gift was not made dependent on the action of the widows, and that the person to take was sufficiently designated.⁵ The same point arose in a Madras case, where

1 Mahomed Buksh v. Hosseini, I. L. R., 15 Cal., 684.

2 22 L. T., (N. S.), 597.

3 Wilkinson v. Joughin, L. R., 2 Eq., 319.

4 Fanindra Deb v. Rajeswar, I. L. R., 11 Cal., 463; Abbu v. Kuppammal, I. L. R., 16 Mad., 355.

5 Nidhoomoni v. Saroda, L. R., 3 I. A., 252; Court of Wards v. Venkata Surya, I. L. R., 20 Mad., 167.

the plaintiff had given property to the defendant, desiring him to perform his obsequies after his death, and it was sought to set aside the gift on the ground that the defendant, being member of a different gotra, could not perform the plaintiff's obsequies, and the Court dismissed the suit.¹ Where a gift was made by a husband to his wife and "your two sons who are minors, for your charitable expenses and "for the maintenance of your minor sons," and after the death of her two sons without issue the widow gave the property to her daughter's son, it was held in a suit by one of the grantor's sons that the gift was absolute, and that the widow's title was not affected by the death of her sons.²

Note 3. Although as between donor and donee the property may, on the happening of a certain event, be resdnable by the donor, such condition will not operate against a purchaser for value from the donee taking without notice of the condition. Similarly when there has been fraud on account of which the gift is voidable, although the person imposed upon may follow the property in the hands of third parties themselves innocent of fraud, this right to restitution does not prevail against persons who have bought the property in good faith without notice.³

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent* to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

1 *Abhachari v. Rama Ghandrayya*, 1 Mad. H. C., 393.

2 *Srimati Pabitra v. Damodar*, 7 Beng. L. R., 697.

3 *Huguenin v. Baseley* 2 W. & T. L. C., 6th ed., pp. 597, *et seq.*

Illustrations.

(a) A has shares in X, a prosperous joint-stock company, and also shares in Y, a joint-stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint-stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

Commentary.

In the first two paragraphs of the section are reproduced with only the necessary change of language, sections 109 and 110 of the Indian Succession Act,¹ and the illustrations are derived from the same source. The principle is that a man who accepts the benefit of a transaction must also accept the burden of the same.

The infancy of the donee does not prevent the property from being transferred to him. But inasmuch as it prevents him from creating obligations as against himself, liberty is reserved to him on attaining majority to return property burdened with an obligation. Similarly a person who while a minor has become partner in a business, may throw off the partnership-liability by disaffirming the partnership within a reasonable time of attaining his majority.² It is quite clear that on his part the donor has no corresponding right to revoke his gift, and therefore if the minor dies, before attaining majority and without repudiating the onerous gift which has been made to him, the gift is complete and irrevocable.³

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of Universal donee. the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

Commentary.

A universal succession is said to take place when a man's assets and liabilities, the sum of his rights and duties, called in Roman law '*universitas juris*' devolve upon another. According to English law such a succession can occur only on the man's death or bankruptcy. It

1 Act X of 1865.

2 See Contract Act, section 248.

3 Subramania v. Sitha Lakshmi, I. L. R., 20 Mad., 147.

cannot be brought about by a voluntary act *inter vivos*. Subject to the provisions of law similar to those contained in section 53 of the Act,¹ and to those of the Bankruptcy or Insolvency law, it is competent to any person to endow another with his whole property, but liabilities cannot similarly be transferred. Notwithstanding the gift, the donor would still remain responsible for his debts, and the donee would come under no obligation to the donor's creditors, unless he came to be constituted a trustee of the donor's property for the payments of his debts. Such a trust in their favour might be created by an admission on the donee's part of his holding the property for the creditors or by the transaction being communicated to the creditors and assented to by them.² The effect of this section is apparently to enable creditors, without questioning the validity of the gift, to sue the donee as if he were the heir of their deceased debtor having assets in his hands. It will be open to them to approbate the gift or to reprobate it under the provisions of section 53. In a case decided without reference to the Act where the donee of a man's entire estate sought to redeem property mortgaged by him and the defendant had another unsecured claim against the donor, it was held that redemption should be allowed only on the terms of the donee paying the unsecured as well as the secured debt.³ A resignation of a person's entire estate may occur in the case of the owner becoming an ascetic, or entering religion, or in the case of a Hindu widow surrendering in favour of the person who would be the reversionary heir of her husband.⁴

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule

Saving of donations *mortis causa* and Muhammadan law.

of Muhammadan law, or, save as provided by section one hundred and twenty-three,

any rule of Hindu or Buddhist law.

1 Relating to the fraudulent transfer of immoveable property.

2 See *ante* p. 128.

3 *Raghoo Govind v. Balvant*, I. L. R., 7 Bom., 101.

4 *Nobokishore v. Hari Nath*, I. L. R., 10 Cal., 1102; *Behari Lal v. Madho Lal*, I. L. R., 19 Cal., 236.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

130. A claim which the Civil Courts recognise as
Actionable claim. affording grounds for relief is actionable
whether a suit for its enforcement is or is
not actually pending or likely to become necessary.

Commentary.

As this chapter deals with transfers of actionable claims in a manner
by no means exhaustive, it will be convenient to pre-
What constitutes
an assignment. mise some observations on the points left untouched
by its provisions. In the first place, what amounts
to an assignment of a debt or an actionable claim? No particular
form or words are required. A written instrument is not indispen-
sable.¹ It suffices if words are used, expressing an intention to appro-
priate the thing in action to the use of the assignee.² A man who
draws a cheque on his banker, gives a letter of credit, or directs one
person to pay money to another generally, and not out of a specific fund,
merely issues an order or mandate which, unless and until action has
been taken on it by the banker or other person so indicated, is revoca-
ble by the giver and fails altogether on his death.³ There is in such
cases no appropriation of property or assignment of a debt. An assign-
ment must have reference to a specific fund or debt, in respect of which
a third person is debtor, or to moneys about to fall due from such third
person. Thus an order "out of the money due to me from Horace
Walpole out of the Exchequer, and what will be due at Michaelmas pay
"to Tonson and Conway," was held to be a good assignment, operating
as such from the moment when the money became payable.⁴ On the
other hand, an order made by a person who was a builder, in favour of
his creditors "Please pay P the amount of his account, £42-14-6, for
"goods supplied," addressed to the defendant, who was the builder's

1 *Antu Singh v. Ajudhia*, I. L. R., 9 All., 249.

2 *Row v. Dawson*, 2 W. & T. L. C., 6th ed., p. 796. Under the Judicature Act the assignment must be in writing.

3 *Ryall v. Rowles*, 2 W. & T. L. C., 6th ed., p. 799; *Story's Equity Jurisprudence*, 11th ed., § 1016; and see Contract Act, sections 201, &c.

4 *Row v. Dawson*, 2 W. & T. L. C., 6th ed., 796; *Buck v. Robson*, 3 Q. B. D., 686.

debtor, was held not to be an equitable assignment, for no fund was named out of which the money was to be paid.¹

Absence of consideration is material only when the assignment is incomplete.² If the assignment is completed, the want of consideration affords no answer on the debtor's part;³ nor can the assignor or his creditors dispute the right of the assignee. But proof of consideration may be material to establish an assignment as distinguished from a mere authority or request which is revocable at the will of the creditor or by his death or bankruptcy. So where a landlord by letter desired his tenant to pay to his bankers a certain sum out of the rent falling due on the next quarter-day and evidence of the agreement under which the letter came to be written was excluded, the Court held that there was nothing more than a request or authority which was revoked by the landlord's bankruptcy.⁴

The question whether the assignee can sue in his own name without the concurrence of his assignor is untouched by the chapter. In England the right of an assignee of a chose in action to sue in his own name is the creature of equity and of recent statutes; for at common law the proper course for him was to sue in the name of the assignor.⁵ In the Court of Chancery it was permissible for him to sue in his own name, the debtor being, as he is here under section 137, entitled as against the assignee to the benefit of any defence which he might have had against the original creditor. Several exceptions from the common law rule were created by statute, among them one enabling the assignees of life-policies to sue in their own names. And by the Judicature Act a similar provision is made generally for cases of the absolute assignment of debts or other legal choses in action (not purporting to be by way of charge only) by writing under the hand of the assignor, of which express notice in writing shall have been given to the person from whom the assignor would have been entitled to receive or claim the debt or chose in action.⁵

In this country the commonly received doctrine has been that the assignment of a chose in action is valid, and that the assignee may sue

¹ *Percival v. Dunn*, 29 Ch. D., 128.

² See note to section 122, and as to notice note to section 131.

³ *Manishankar v. Bai Muli*, I. L. R., 12 Bom., 686; *Kachu Bayaji v. Kachoba*, 10 Bom. H. C., 491; see *In re Patrick*, [1891] 1 Ch., 82.

⁴ *Ex-parte Hall*, 10 Ch. D., 615.

⁵ 36 & 37 Vic., c. 66, section 25; *National Provincial Bank v. Harle*, 6 Q. B. D., 626; *Barlinson v. Hall*, 12 Q. B. D., 347; *Tancred v. Delagoa Bay Co.*, 23 Q. B. D., 239; *English and Scottish Investment Co. v. Brunton*, [1892] 2 Q. B., 7.

in his own name without joining the assignor or obtaining his consent.¹ In one case it was however decided by the High Court at Calcutta that the transferee of a life-policy could not compel the Insurance Company to pay the policy-money without obtaining the concurrence of the legal representative of the transferor, whose life was the subject of the insurance.² The transfer was made in the usual way by indorsement on the policy, which was noted by the defendant's Company, and it was admitted that they had received the premiums from the immediate transferor, and afterwards from the plaintiff. The transfer however was not expressed to be made for value, and the plaintiff declined to go into evidence of consideration. It was held by Broughton, J., that inasmuch as the law and practice was to require the assignee to sue in the name of the assignor, and there was no enactment here as there was in England, enabling an assignee of a life-policy to sue in his own name, the Company were justified in insisting on the concurrence of the assignor's legal representatives; and the judgment was confirmed on appeal.³ But in neither of the judgments is reference made to the cases above referred to, as establishing the contrary proposition; and it is assumed that the rule of the English common law, unaffected by equitable doctrine, prevails except in cases where it has been modified by statute law. It is submitted that the decision is erroneous. The fact that the transfer was not proved to be made for valuable consideration was immaterial, because the transferor had done everything that could be done to invest the transferee with all his rights in the policy. The transfer was complete and, though it had been made by way of gift, could not have been revoked by the transferor himself. It follows that there was no necessity to obtain a discharge from the transferor's representatives.⁴

Among the claims which have been held to be actionable claims and are assignable now as before the passing of the Act are the vendor's right so long as no condition remains to be performed on his part,⁵ the right under a contract for the delivery of shares,⁶ the right of a Hindu to his share of family property,⁷

1 *Kristna Chetti v. Balarama*, 1 Mad. H. C., 139; *Anonymous v. Muttusamiya Pillai*, *ib.*, 140; *Kadarbacha v. Rungaswami*, *ib.*, 150; *Vembakum Somayajee v. Mooneswamy*, 4 Mad. H. C., 176; *Kanhaiya v. Domingo*, I. L. R., 1 All., 732.

2 *Rajnarain v. Universal Life Assurance Co.*, I. L. R., 7 Cal., 594.

3 10 Cal. L. R., 461.

4 *Pearson v. Amicable Assurance Co.*, 27 Beav., 229.

5 *Ahmad-ud-din v. Majilis*, I. L. R., 3 All., 12, the vendor was not ready and willing to complete and therefore could not have sued; see *Ramakrishna v. Kurikal*, I. L. R., 11 Mad., 445.

6 *Dayabhai v. Dullabham*, 8 Bom. H. C., 135.

7 *Rajanikanth v. Hari Mohan*, I. L. R., 12 Cal., 470; see *Rudra Perkanah v. Krishna*, I. L. R., 14 Cal., 241.

and the right of a mortgagee under his mortgage.¹ As to this last there has been some difference of opinion, but the better opinion is that the claim for a debt secured by a mortgage is an actionable claim within the meaning of this chapter.² On the other hand the mortgagor's right, at any rate in the case of a simple or usufructuary mortgage, is the right of ownership or property and no more a mere right of action than the right of a lessor. The purchaser of mortgaged property cannot be treated as the assignee of an actionable claim.³ The High Court at Calcutta has decided⁴ that a claim which has already passed into a decree does not come within the definition of actionable claim, apparently on the ground that special provisions regarding the transfer of decrees and the notice necessary to be given in such cases are made in the Code of Civil Procedure.⁵ In another Bengal case it was held that the right of a purchaser of land under an instrument, executed by a vendor not in possession of the land, is not an actionable claim to which section 135 could be applied.⁶ Following this case the Madras High Court held that the circumstance that an elephant sold to the plaintiff was not in the seller's possession did not bring the case within the operation of section 135.⁷ In Allahabad it has been held that the phrase 'actionable claim' includes only claims in which a cause of action has actually arisen and that section 135 does not affect the assignee of a claim which at the date of assignment has not fallen due.⁸ It was remarked that 'actionable claim' could not be construed as co-extensive with the term 'choses in action;' and the observation is no doubt well founded, since 'choses in action' is an expression used in English law to denote all personal chattels not in possession as distinguished from personal chattels which pass by delivery. Stocks and shares in a company are therefore choses in action although they are not recoverable by action.⁹ And

1 *Ohinnayya v. Ohidambaram*, I. L. R., 2 Mad., 212; *Lala Jugdeo Sahai v. Brij Behari Lal*, I. L. R., 12 Cal., 505; *Subbammal v. Venkatarama*, I. L. R., 10 Mad., 289; *Keval v. Fakira*, I. L. R., 18 Bom., 42.

2 *Muchiram v. Isham Chunder*, I. L. R., 21 Cal., 569; *Russick v. Romanath*, ib., 792.

3 *Tota Ram v. Lala*, I. L. R., 20 All., 408; *Gopal Ramchandra v. Gangaram*, I. L. R., 14 Bom., 172.

4 *Afzal v. Ram Kumar Bhudra*, I. L. R., 12 Cal., 610.

5 Act XIV of 1882, section 232; and see *Mulchand v. Ohhagan*, I. L. R., 10 Bom., 74.

6 *Modun Mohun v. Futtarunnissa*, I. L. R., 13 Cal., 297.

7 *Ramakrishna v. Kurikal*, I. L. R., 11 Mad., 445.

8 *Shib Lal v. Azmat-Ullah*, I. L. R., 18 All., 265.

9 *Colonial Bank v. Whinney*, 11 App. Cas., 426.

they are clearly not actionable claims within the meaning of this chapter. But it is by no means clear that the Legislature intended to have such a narrow construction put on the phrase 'actionable claim' as to exclude from the operation of the chapter some claims which according to English law would be called debts. In the Allahabad case, the claim was in respect of a mortgage-bond under which money was payable at a date subsequent to that of the assignment. There was a debt, *debitum in præsentis solvendum in futuro*, which might have been attached.¹ It was none the less a debt because the time for payment had not arrived. The term 'debt' is used in several sections of the Act and there is no reason to suppose that it is not intended to denote liquidated money claims as distinguished from damages. Both kinds of claims are included among actionable claims and so in section 8 the expression used is 'debt or other actionable claim.' It is hardly consistent with this language to say that some debts are not actionable claims within the meaning of the Act. Nor is the construction adopted in Allahabad supported by considerations of policy, for the reasons on which section 130 is founded apply equally whether the debt assigned is payable *in præsentis* or *in futuro*. For other instances of claims which cannot be assigned see note 5 to section 6.

. 131. No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

Illustration.

A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

¹ Webb v. Stenton, 11 Q. B. D., 518; Jones v. Thompson, 1 E. B. & E., 63; Tapp v. Jones, L. R., 10 Q. B., 591; *In re Cowan's Estate*, 14 Ch. D., 648. As to distinction between money *debitum in præsentis solvendum in futuro* and money payable on condition, see Young v. Mangilipilly, 3 Mad. H. C., 125.

Commentary.

It might be contended that this section taken with the next was intended to impose on the assignee the obligation of procuring notice to be given before action to the debtor by the assignor. It has however been held that the notice conveyed by the writ is sufficient and that no prior notice need be given. All the High Courts have adopted this view.¹ As between the assignee on the one hand and the assignor and all persons standing in the same position as the assignor, *e.g.*, his creditors or executors,² on the other hand, notice to the debtor is not necessary to give effect to an assignment which is otherwise complete. Having made an assignment, the assignor is under an implied covenant not to derogate from his own grant, and an action may be brought against him on that covenant if afterwards he defeats the assignment by getting in the debt or releasing it,³ or he may be restrained from suing for his own benefit.⁴ When after making a voluntary settlement of certain debts, secured by a bill of sale of chattels, the settlor himself got in the debts, it was held that on his death his estate was accountable to the trustees of the settlement for the amount so collected, although no notice had been given to the debtors.⁵ If the assignment had been incomplete, the Court could have given no assistance, as a volunteer claiming under an imperfect grant or conveyance is no better position than a person in whose favour a promise unsupported by valuable consideration has been made.⁶

Notice to the debtor or trustee becomes important when the assignee, not content with the personal credit of his assignor, desires to put it out of the latter's power to do anything to the prejudice of his right. Notice of assignment prevents the debtor paying off his original creditor, and renders the trustee directly responsible to the assignee. It is of material importance in deciding to which of several assignees of the same debt preference is to be given; for according to the rule laid down in *Dearle v. Hall*,⁷ in a competition between two equitable assignees

1 *Lala Jugdeo Sahai v. Brij Behari Lal*, I. L. R., 12 Cal., 510; *Subbammal v. Venkatarama*, I. L. R., 10 Mad., 289; *Kalka Prasad v. Chandan*, I. L. R., 10 All., 20; *Ragho v. Narayan*, I. L. R., 21 Bom., 61.

2 *Megji v. Ramji*, 8 Bom. H. C., (O. C.), 169; *Burn v. Carvalho*, 4 My. & Cr., 690; *Jadowji v. Jethu*, I. L. R., 4 Bom., 333.

3 *Aulton v. Atkins*, 18 O. B., 249; *Gerard v. Lewis*, L. R., 2 O. P., 305.

4 *Jeffs v. Day*, L. R., 1 Q. B., 372.

5 *In re Patrick*, [1891] 1 Ch., 62, as to voluntary assignments, see *post* p. 424.

6 *Ellison v. Ellison*, 1 W. & T. L. Q., 6th ed., 291; *In re Earl of Lucan*, 45 Ch. D., 470; *Hirbai v. Jan Mahomed*, I. L. R., 7 Bom., p. 251.

7 3 Russ., 1.

for value, the assignee who first gives notice to the trustee acquires the better title.*

Until the debtor receives notice he owes no duty to the assignee, and therefore if the latter neglects to give notice he may find himself disappointed, payment having been made in the meantime to the original creditor. As assignee of the debt he may sue the debtor without previously giving him notice. But the debtor will have a complete answer to his suit if he can show that, having had no notice of the assignment, he has paid the money to the assignor or his nominee.¹ And the trustee of moveable property is in the same position as regards a transferee of a beneficial interest in the same, for under section 28 of the Indian Trusts Act the trustee is protected if, not having notice that the interest of the beneficiary has become vested in a third person, he makes payments or delivery to the original beneficiary. In respect of any acts done by the debtor or trustee before notice received, the assignee has no remedy against him.² Notice to one of several co-trustees does not affect the others so as to make them liable for what they do in ignorance thereof.³ Once notice of assignment is received, the debtor or trustee has no option but to act upon it. Thus where a builder, being entitled to receive money due under a contract with the defendant, assigned such money to the plaintiff, and notice was given to the defendant, it was held that the assignment could not be defeated by a payment subsequently made by the defendant, although it was made in order to enable the builder to complete his contract. It would have been otherwise if the defendant might have taken the work out of the builder's hands and finished it himself, or if the contract had required or sanctioned the making of advances to the builder.⁴

Where the debtor is a party to the transfer, the case is one of novation and there is really no question of an assignment. Thus "suppose A owes B £100, and B owes C £100, and the three meet and it is agreed "between them that A shall pay C the £100; B's debt is extinguished, "and C may recover that sum against A."⁵ By a tripartite agreement C instead of B becomes the creditor of A. In another case *Harding*

1 Similarly if a mortgage-debt is paid off without notice of an assignment of the mortgage, *Jones v. Gibbons*, 9 Ves., 410; *In re Lord Southampton's Estates*, 16 Ch. D., 178, see note to section 137.

2 *Donaldson v. Donaldson*, Kay, 711.

3 *Low v. Bouverie*, [1891] 3 Ch., p. 104.

4 *Brice v. Bannister*, 3 Q. B. D., 569.

5 *Tatlock v. Harris*, 3 T. R., 174; *Autu Singh v. Ajudhia*, I. L. R., 9 All., 249.

v. Harding,¹ the defendants, being trustees under a will, had given a statement of account showing a balance due to the residuary legatee, and the latter sent the account to the plaintiff with a direction in the following terms:—"I hereby instruct the trustees in power to pay to "my daughter (the plaintiff) the balance shown in the above statement." The defendants received notice in writing of this direction, but refused to act upon it. The Court gave judgment for the plaintiff chiefly on the ground that the trustees had in fact assented to the assignment, but apart from that Wills, J., held that the assignment was valid and binding for when "the subject-matter of the transaction is an equitable right or estate and a legal title cannot be given, then if the settlor "has done all in his power and nothing remains to be done by him, equity "regards it as though he had completed the legal title and gives effect to his intention."

According to the rule above-stated² assignees of equitable interests take rank, not according to the date of their several assignments but according to priority in giving notice to the trustee. By giving such notice the latter gains priority over the earlier assignee who has failed to give any notice. This rule, however, has to be qualified by the statement that it does not apply in favour of an assignee who is a mere volunteer, or in favour of one who on taking the assignment has notice of a prior assignment. In other words the rule is confined in its application to assignees for value without notice.³ Regard is had to the date of the assignment only if the two assignees give notice simultaneously.⁴ The equitable rule as to notice, though justified on several grounds, seems to have been borrowed from the decisions in bankruptcy as to the acts which were necessary under the statute to take a chose in action out of the order and disposition of a bankrupt. It is thus explained in *Dearle v. Hall*:—

"It is true that a chose in action does not admit of tangible actual possession and that neither Brown (the assignor) nor any person claiming under him were "entitled to possess themselves of the fund which yielded the £93 a year. But in "*Ryall v. Rowles*, the Judges held that in the case of a chose in action, you must do "everything towards having possession, which the subject admits: you must do that "which is tantamount to obtaining possession by placing every person who has an "equitable or legal interest in the matter, under an obligation to treat it as your "property. For this purpose you must give notice to the legal holder of the fund; "in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice, you are guilty of the same

1 17 Q. B. D., 442, cited in *Hirbai v. Jan Mahomed*, I. L. R., 7 Bom., 251.

2 See *ante* p. 420, citing *Dearle v. Hall*, 8 Russ., 1.

3 *Ryall v. Rowles*, 2 W. & T. L. C., 6th ed., p. 799.

4 *Johnstone v. Cox*, 16 Ch. D., 571.

"degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person."¹

Reviewing the decisions in a recent case Lord Herschell says that "the leading consideration which induced the Court to lay down the rule that he who gives notice has a better equitable title than a prior incumbrancer who has given no notice was this, that any other decision would facilitate fraud by the *cestui que trust*, and cause loss to those who might have used every precaution that was possible to ascertain, before parting with their money, that the title they were taking was a valid one, and who might have done everything they could to render that title secure."² In the same case it is pointed out that it is the mere giving of notice and not the making inquiry that is material; and that the trustee of a fund is not bound to answer questions about it or give information to intending assignees.

The Trusts Act does not contain any rules for determining the priority among several assignees of the same beneficial interest in a trust fund. Section 58 of the Trusts Act merely declares the right of the beneficiary to transfer his interest, but does not specify the conditions of a complete transfer. Section 69 declares that the transferee has the rights, and is subject to the liabilities of the beneficiary, in respect of such interest at the date of the transfer. The only provisions in this Act as to the duty of the trustee are those contained in sections 131 and 133. From those two sections read together it would seem to follow that the debtor or trustee is bound to give effect to the transfer of which he first receives notice without regard to any other consideration. If this is so, transfer of debts and beneficial interests in moveable property may be compared with assignments of debts or other legal choses in action under the Judicature Act.³

1 *Dearle v. Hall*, 3 Russ., 1; *Mutual Life Assurance Society v. Langley*, 32 Ch. D., p. 471.

2 *Ward v. Duncombe*, [1898] App. Cas., 369, 378.

3 Section 25, sub-section six, 36 & 37 Vict., c. 66, is as follows:—

"Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor."

It is apprehended that a voluntary assignment of a debt made in conformity with the provisions of the Judicature Act would give an indefeasible title to the assignee; and that here, similarly, on notice being given an assignment whether made with or without consideration would be equally good. The present Act makes no exception in favour of assignees for value or to the prejudice of assignees taking with notice of a prior assignment. By section 137, however, it is provided that the transferee takes subject to the liabilities to which the transferor was subject at the date of the transfer.

Although the terms of the section would not justify the application of the doctrine of constructive notice, and it is apparently meant that the debtor should in one way or another have received actual notice, it would seem to be immaterial by whom, in what form and under what circumstances the notice was conveyed. This result does not accord with the English cases, for though notice may be given orally it must be given, not in the course of a casual conversation, but distinctly and in a formal manner, if it is intended to bind a trustee. It must amount to this—"Mind and remember this, and if anyone inquires of you, inform him that the trust fund is incumbered."¹ It stands to reason that a trustee whom it is intended to affect by a notice should receive the notice in such unequivocal terms and from such a source that he may feel no hesitation as to his duty to act upon it. Notice to one of several trustees does not affect the others so as to make them liable for what they do in ignorance of it.

Where there are several trustees of a fund, notice of an incumbrance upon it given to one of them is sufficient to give the incumbrancer priority over another incumbrancer or assignee, provided that the circumstances remain unaltered by the death or retirement of the trustee receiving the notice, before the second assignment or incumbrance takes place. The subsequent death of the trustees does not affect the priority already acquired.² In a case where one of the trustees being also a beneficiary had assigned his interest, it was held that while the notice acquired by him as assignor did not constitute notice to the trustees, as such, it would be otherwise if the assignee were one of the trustees, for he would of course for his own protection give notice of the assignment to future incumbrancers.³ On a change of trustees it is not obligatory on the

¹ *In re Tichener*, 35 Beav., 317; but see also *Lloyd v. Banks*, L. R., 3 Ch., 488; and *Saffron Walden Building Society v. Rayner*, 14 Ch. D., 411.

² *Ward v. Duncombe*, [1893] App. Cas., 369.

³ *Browne v. Savage*, 4 Drew., 635; *In re Selby*, 8 D. M. & G., 271; *Newman v. Newman*, 28 Ch. D., 674.

new trustees to inquire of the old trustees whether they have received notice of incumbrances. The omission to inquire is no breach of trust on their part.¹ They cannot be charged on that account as if they were affected by the notice given to others. On the other hand trustees are not bound to give information to a stranger about incumbrances on the property, and if in answer to inquiries they give answers which are honest but erroneous, they incur no responsibility.² If the whole or part of the fund is in Court, then as the trustee no longer has dominion over it, the assignee must go to the Court and apply for a stop order.³

The notice is inoperative unless the relation of creditor and debtor or *cestui que trust* and trustee is actually existing when the notice is given. So where an officer in the army assigned to two different persons the proceeds to arise from the sale of his commission, and one of them gave notice to the army agent before and the other after the money had come into his hands; it was held that the later notice alone was operative, and therefore that the assignee who gave it must be preferred.⁴ When once the money is in the agent's hands, the notice is good and it matters not that the money is not immediately payable.⁵ The point of time at which the later assignee's knowledge of the earlier assignment may be material is the date of the assignment, not the date when he gives notice of his assignment. The fact that when he gives notice he is aware of the earlier assignment, is immaterial, for he is at liberty to perfect his assignment by giving notice.*

It will be observed that this section does not extend to transfers of interests in immoveable property, and is thus in accordance with English law according to which the doctrine of notice, applicable to equitable interests in personal property, does not extend to conveyances of equitable interests in land. The conveyance therefore of a mortgagor's equity of redemption takes effect from the date of its execution and the purchaser is not bound to give notice to the mortgagee.⁷ Nor again is notice to the mortgagor necessary to complete the title of the particular assignee of a mortgage as against the assignee in bankruptcy. In a recent case a bank, being under advances to a solicitor, obtained

1 Phipps v. Lovegrove, L. R., 16 Eq., 80.

2 Low v. Bouverie, [1891] 3 Ch., 82.

3 Mutual Life Assurance Society v. Langley, 32 Ch. D., 460.

4 Addison v. Cox, L. R., 8 Ch., 76.

5 Callisher v. Forbes, L. R., 7 Ch., 109; and see *Ex parte Moss*, 14 Q. B. D., 310; Megji v. Ramji, 8 Bom. H. C., (O. C.), 169.

6 Mutual Life Assurance Society v. Langley, 32 Ch. D., 460.

7 Govindrav v. Ravji, I. L. R., 12 Bom., 33; and see notes to sections 48 and 78.

from him a mortgage and other title-deeds by way of security, and gave notice to the mortgagors of the property comprised in the deeds. It was held that, as against the client, in trust for whom the solicitor held the mortgage, the bank was not entitled to any priority by reason of the notice so given.¹

132. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Notice to be in writing signed.

Commentary.

It seems probable, as is pointed out by Farran, C.J., that there has been a mistake in drafting this section, for it is strange that the obligation to give notice should be cast upon the assignor when it is the assignee that is interested in seeing that notice is given.² The provision however is not of much importance, because under section 131 the debtor is equally affected by the transfer whether due notice of it is given to him, or whether he is otherwise aware of it. In England also under the Judicature Act there is a provision to the effect that notice must be given in writing, and the omission to give notice entails the consequence that the assignee has to sue in the name of his assignor as he would have done before the Act was passed.³

133. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

Debtor to give effect to transfer.

Commentary.

If the assignment is valid as between the assignor and assignee, the debtor or other person holding the property has no rightful interest in refusing satisfaction to the assignee; for it is necessary for a valid assignment that the assignor should actually abandon his claim against

¹ *In re Richards*, 45 Ch. D., 589; *Hopkins v. Hemsworth*, [1898] 2 Ch., 347; see cases cited in note to section 78.

² *Ragho v. Narayan*, I. L. R., 21 Bom., 62.

³ *Walker v. Bradford Old Bank*, 12 Q. B. D., 511.

the debtor and he cannot derogate from his own grant.¹ Consent to the assignment on the debtor's part is not essential to its validity.² The proviso assumes that, in the case of debts, the law of the debtor's residence, and, in the case of tangible property the law of the place where it is situate governs any assignment of such debts or property. If, for instance, notice is required, as according to Scotch law it is,³ to make the assignment of a debt complete, the debtor being a resident in Scotland and not having received notice of the assignment would not be bound to give effect to it. It is to be noted that the residence, not the domicile, of the debtor is mentioned.

The rule of international law presupposed by the section does not agree with that declared in the Negotiable Instruments Act according to which the liability of the acceptor is regulated by the law of the place where the instrument is payable, (section 134). The place of the performance of a contract is generally the place of the creditor's residence; and so Phillimore observes that "debts and rights and causes of action are universally treated by jurists as attached to the person of the creditor and governed by the law of his domicile. They may be the subject of assignment, either absolutely or conditionally, with or without notice or intimation to the debtor according to that law."⁴ In thus referring to notice or intimation Phillimore alludes to the Scotch law mentioned above. In *Lee v. Abdy*⁵ the validity, not the completeness, of an assignment was in question. A policy of insurance granted by an English society had been assigned in the Cape Colony by the assured to his wife; they both resided in the Colony and it appeared that according to Cape law such an assignment was invalid. It was held that the Cape law must be applied and that therefore the wife could not recover on the policy.

With regard to tangible property, immoveable and moveable, there is no doubt that in general it is governed by the law of the place where it is situate, *lex rei sitæ*. "If personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding every where."⁶ According to the section the trustee in whom such property is vested is not bound to deliver it to an assignee unless the assignment is complete according to the foreign *lex sitæ*.

1 *Chedambara Chetty v. Renja Krishna*, 13 Beng. L. R., 509.

2 *Brice v. Bannister*, 3 Q. B. D., p. 574; *Kristna Chetti v. Balarama*, 1 Mad. H. C., 139; see Trusts Act, section 69.

3 Bell's Prin., § 459.

4 Phill. Intern. Law, Vol. IV, p. 611; Wharton's Conflict, § 361, &c.

5 17 Q. B. D., 309; see *Le Feuvre v. Sullivan*, 10 Moo. P. C., 1; see also *Westlake Priv. Inter. Law*, § 221.

6 *Cammell v. Sewell*, 28 L. J., Ex., p. 353; *Alcock v. Smith*, [1892] 1 Ch., 268.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

Commentary.

In the absence of special contract the assignor of a debt does not warrant the solvency of the debtor or the payment of the debt. Where there is a warranty of solvency, it is *prima facie* a warranty of present, and not of continued, solvency. To warrant the payment of the debt imports the obligation of a surety such as is undertaken by the indorser of a negotiable instrument.

No provision is made for any warranty of title on the part of the assignor. There can however be little doubt that the assignor for value of a debt does undertake that the debt is an actually subsisting one and that his title to assign it is good.¹ There is further an obligation on the part of the assignor not to derogate from his own grant by releasing or recovering the debt.²

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Discharge of person against whom claim is sold.

Nothing in the former part of this section applies—

(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold;

(b) where it is made to a creditor in payment of what is due to him;

(c) where it is made to the possessor of a property subject to the actionable claim;

(d) Where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

¹ Compare Bell's Prin., § 1469; Mackenzie's Roman Law, p. 265.

² See ante p. 420.

Commentary.

The origin of the rule embodied in this section is thus stated in Colquhoun's Roman Civil Law.¹ "The maxim that

Origin of the rule. "the cessionary succeeds into the place of the cedent leads to the natural deduction, that he can demand and have from the debtor everything which the cedent himself could have recovered. An exception to this natural consequence was introduced in order to prevent unjust claims being acquired by trickery. The result of a combination of the *Lex Anastasiana* with the constitution of Justinian which immediately follows it in the Codex, is to grant an extraordinary and exceptional relief, and goes to restricting unconditionally a cessionary who has acquired a claim to it by purchase, or partly by purchase and partly by gift, whether the claim be certain or uncertain, or the vendor *in dolo*, and whether the sale be forced upon him or otherwise, from claiming from the debtor more than the money actually paid together with interest, and to releasing the debtor from all liability beyond such sum and interest by extinguishing the obligation *pro tanto*."

This rule extended only to the case of sales proper and was subject to the exceptions for which provision is made in clauses (a), (b) and (c). Furthermore it did not extend to sales by public auction.

In a case from the Colony of British Guiana where this rule as part of the Roman Dutch law was in force, it was contended on behalf of a second mortgagee that the assignee of the first mortgage, having received the sum paid by him for the mortgage with interest, had no further claim and that the first mortgage must be held to be extinguished. It was ruled however by the Privy Council that the *Anastasian* law cannot be applied to cases free from any taint of unfairness, consistently with the ordinary principles which regulate the administration of justice.² In England there is now, at any rate, no doubt that the purchaser of a debt who pays a less sum for it than the amount due will in general be entitled to the full amount of the debt.³

No special reason is given by the Commissioners for the introduction of this provision.⁴ No doubt the object is to prevent speculative

1 § 1758; see *ex-parte* Holthausen, L. R., 9 Ch., 722.

2 *Macrae v. Goodman*, 5 Moo. P. C., p. 336.

3 As to the case of surety, trustee, &c., in England, see Robbins' Law of Mortgage, p. 822; and *Jones v. Gordon*, 2 App. Cas., p. 631. "An agent, trustee, heir-at-law or executor purchasing a puisne incumbrance, as against another incumbrancer shall be paid no more than what he gave for this incumbrance; otherwise as to a prior creditor who *bonâ fide* buys in a puisne incumbrance though he did not give the full value for it," per Lord Hardwicke, *Morret v. Pasko*, 2 Atk., p. 54.

4 See Robbins' Law of Mortgage, p. 822, citing Gilb. Lex. Præst., pp. 282, 283; and *Jani Begam v. Jahangir*, I. L. R., 9 All., p. 480.

trafficking in actionable claims; but it may be questioned whether it will not equally prove an impediment to legitimate transactions, and also whether it cannot be successfully evaded. Suppose, for instance, that a merchant or other person having moneys owing to him is desirous to leave the country before the moneys can be collected or even suits can be brought, and is willing to hand over his claims to another, on receiving cash and allowing a fair discount according to the circumstances. There is nothing objectionable in such an arrangement, and yet if the terms on which the transfer was made came to the knowledge of the debtors, they would be in a position to claim a similar discount, and thus deprive the transferee of the premium for which he had stipulated on account of the risk run. In such a case it would at the same time be possible for unscrupulous persons to feign an antecedent debt, and so bring the case within exception (b). And other ways of dissimulating the transaction might be suggested. Moreover, it may be asked what effect is to be given to the section in the case of an assignment of a debt which is or purports to be voluntary and without consideration. If there is really a genuine gift of the debt, the section clearly does not apply, and the general rule must prevail that the debtor cannot raise any objection on the score of want of consideration.¹ Presumably it will be for the debtor, taking advantage of the section, to show that the assignee had bought the actionable claim and then for the assignee to show what was the price paid or payable.

This section was applied to a case where the plaintiff had, after the institution of a suit by one Sitanath against the defendants, purchased from him his rights and interests in the suit. The claim made in the suit was for a declaration of Sitanath's right to a share in certain property, which during his minority his co-sharers had leased to the defendants, and for possession of that share. On the plaintiff being substituted for Sitanath in the suit, the defendants applied to have it dismissed on payment into Court of the purchase-money paid to the plaintiff. The High Court of Bengal held that the suit was rightly dismissed on these terms.² In a later case, the Court overruled the contention that the plaintiff was entitled only to the amount paid by him for the transfer. The reason given was that "the section does not say that a transferee is not entitled to recover from the debtor the full amount of the debt due from the latter. It simply says that the debtor "would be wholly discharged by paying to the buyer the price and the

1 *Mainshankar v. Bai Muli*, I. L. R., 12 Bom., 686; see *Umedmal v. Dava Bin Dhondiba*, I. L. R., 2 Bom., 547.

2 *Rajanikanth v. Hari Mohan*, J. L. R., 13 Cal., 470.

"incidental expenses of the sale with interest on the price from the date 'the buyer paid it.'"¹ This construction puts the debtor in the anomalous position of being enabled to discharge himself by payment before action, or even after action by payment into Court, of a sum smaller than he would have to pay under a decree. According to this view the first paragraph of the section has no application to cases in which the debtor denies the existence of the debt and the purchaser has accordingly to make good his claim by obtaining judgment in affirmance of it; and, on the other hand, clause (d) is not limited to cases where judgment has been delivered or the case been made clear by evidence before the sale of the claim.² The debtor can take advantage of the section at any time before judgment, but otherwise the assignee recovers the full amount of the debt.³ In the former case it is not necessary that there should be actual payment. Nor even is a strict tender required and the money need not be paid into Court. A mere offer to pay the consideration *plus* the estimated expenses and interest is sufficient. More could not reasonably be required, for the debtor is not likely to know the precise amount which he has to pay.⁴ In Allahabad⁵ and Madras⁶ a different view has been maintained. There it is held that clause (d) relates only to the state of things existing at the date of the sale, and that the assignee in any case not coming within that or the other saving clause, is entitled to recover no more than the price paid by him and his incidental expenses. It has also been held that the plaintiff suing upon a mortgage-bond does not bring the case within clause (d) by showing that the obligee had before the assignment to him made good his claim to the property against creditors of the defendant attaching it, or had obtained a decree by consent for one instalment due under the bond.⁷ In Bombay the Court has agreed with the Madras and Allahabad Courts in holding that clause (d) refers to the state of things existing at the date of the transfer, but nevertheless follows the Calcutta Court in holding that the section does not prevent an assignee from recovering the full amount. According to this view it is

1 *Grish Chandra v. Kashisauri*, I. L. R., 13 Cal., 145, followed in *Khoshdeb v. Satar*, I. L. R., 15 Cal., 436.

2 *Rajendra v. Watson & Co.*, I. L. R., 18 Cal., 510.

3 *Muchiram v. Ishan*, I. L. R., 21 Cal., 568; *Debendra v. Pulin*, I. L. R., 24 Cal., 763.

4 *Jāni Begam v. Jahangir*, I. L. R., 9 All., 480; *Hakim-un-nissa v. Deonarin*, I. L. R., 13 All., 102.

5 *Nilakanta v. Krishnasawmy*, I. L. R., 18 Mad., 225; *Subbammal v. Venkatarāma*, I. L. R., 10 Mad., 289.

6 *Ramachandra v. Venkatarāma*, I. L. R., 13 Mad., 516.

only by actual payment or legal tender made before decree that a debtor can derive any benefit from the section.¹

A claim in respect of which a judgment has been entered up under section 86 of the Insolvent Debtor's Act falls within the operation of clause (d)² and the section clearly does not affect a purchaser in execution of a decree, for such a purchase is by section 2(d) exempted from the operation of the Act.³ The judgment affirming the claim must definitively determine to whom the money is payable.⁴

136. No judge, pleader, mukhtar, clerk, bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

Incapacity of
officers connected
with Courts of
Justice.

Commentary.

This provision may be compared with that contained in the Code of Civil Procedure,⁵ prohibiting any officer having any duty to perform in connection with any sale under Chapter XIX of the Code, from acquiring any interest in property sold at such sale. But the present section is far more comprehensive in its terms. An actionable claim is a term bearing the widest meaning. Every actionable right which has not passed into a decree, whether or not a suit has been or is likely to be brought to enforce it, is affected by the prohibition, provided that it is one falling under the jurisdiction of the Court in which the individual concerned exercises his functions.⁶ If it was intended to limit the prohibition to those cases where the claim has actually fallen under the jurisdiction of the Court, the intention has not been clearly expressed. But otherwise it must follow that securities, such as debentures of Companies, cannot be bought by judges or pleaders of the High Court. On the face of the section, there is no reason why the prohibition should not be held to apply to claims litigated or capable of being litigated in the Court in its appellate as well as in its original jurisdiction. It has

¹ *Vishnu v. Dagadu*, I. L. R., 19 Bom., 200; *Anandrao v. Durgabai*, I. L. R., 22 Bom., 761.

² *In re Ranchod Khushat*, I. L. R., 21 Bom., 573.

³ *Krishnan v. Perachan*, I. L. R., 15 Mad., 382.

⁴ *Suryanarayana v. Ramamurti*, I. L. R., 21 Mad., 253.

⁵ Act XIV of 1882, section 202; and see *Goshain v. Chugun*, 2 N. W. P., 46; and *Kerakoose v. Serle*, 3 Moo. J. A., pp. 329, 346, as to the policy of the rule.

⁶ *Appasami v. Scott*, I. L. R., 9 Mad., 6; as to meaning of 'chose in action,' see *Colonial Bank v. Whinney*, 11 App. Cas., 426, and cases cited in note to section 130.

however been held that a vakil of the High Court as such, or an officer of a District Court, is not prohibited from buying a bond on which an action may be brought in a Court subordinate to that to which the vakil or officer is attached. The effect of those two decisions is to limit the operation of the section by confining it to the cases in which the claim is necessarily and immediately litigated in the Court in which the person affected habitually exercises his functions.¹

The section makes no mention of solicitors or attorneys, but doubtless it would be held that as officers of the Court, they come within the general words.

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of debt.

Illustration.

A debenture is issued in fraud of a public Company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

Commentary.

Section 131 prevents the transfer of a debt from having any operation against the debtor until notice of it is given to him. The debtor who before receipt of such notice has made a payment to the creditor is not deprived of the benefit of it because there has been an assignment of the debt. The present section in terms relates to the liabilities of the creditor at the date of the transfer and declares that the assignee is to take subject to them. The English rule that the assignee of an equity is bound by all the equities affecting it affords a larger protection to the debtor, for whether the liabilities of the creditor exist at the date of the transfer or arise subsequently, the debtor may take advantage of them against the assignee, provided that they have arisen out of circumstances which existed before notice of the assignment was given.² The rule that the assignee of an equity is bound by all the equities affecting it is another way of stating the general rule that an assignee takes no better title than the assignor had to convey. The case of negotiable instruments is exceptional. If such an instrument is indorsed to a holder for value, having no notice of any fraud, that holder has an unimpeachable

1 Rathnasami v. Subramanya, I. L. R., 11 Mad., 56; Singarachari v. Sivabai, ib., 498.

2 Brice v. Bannister, 3, Q. B. D., 569, 578.

title. But if the same instrument is assigned, in any other way, the defence of fraud is available to the person liable upon the instrument against the assignee just as it would have been available against his assignor. In other words an assignor against whom fraud can be pleaded can pass no better title to his assignee.¹ The latter take it subject to the equities affecting the claim. So in the case from which, as it would appear, the illustration is taken, the plaintiff was the purchaser in the ordinary course of business of some debentures issued under the seal of a Joint-Stock Company, as to which it was found that they were obtained by the original holder through a combination between him and the chairman to defraud the Company. Although the plaintiff bought in good faith without notice of the fraud, and the transfer to him was registered in the books of the Company and interest was paid to him, it was held that the general rule applied, and he was accordingly restrained from suing the Company on the debentures.² In *Graham v. Johnson*³ the plaintiff executed a bond in favour of the defendant under circumstances which were held to entitle him to have it given up and cancelled. It was held that the other defendant, who was a *bond fide* assignee of the bond for value, was equally affected by this equity, and that it was no answer to say that the bond was given with the intention that it should be used as a negotiable instrument, that intention not being expressed on the face of the instrument.

There is another sense in which the section, and also the maxim quoted above, may be applied. "Unless a contrary intention appears in the original contract, the debtor is entitled as against the assignees of the creditor to the benefit of any defence which he might have had against the creditor himself. Thus if A transfers to C a debt due to him by B, A being at the same time indebted to B, B when sued by C is entitled to his set-off, though C was not aware of it."⁴ In *Young v. Kitchen* the plaintiff sued as assignee of a debt due on a building contract and it was alleged in the statement of defence that the assignor was liable to the defendant in damages for breaches of the same contract. It was held that the

*Defences good
against assignor
equally good against
assignee.*

¹ *Whistler v. Forster*, 32 L. J., C. P., 161.

² *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J., 294. This case was however severely commented on by Malins, V.C., in *re Hercules Insurance Co.*, L. R., 19 Eq., 302. See also *Goodwin v. Roberts*, 1 App. Cas., 476; *Easton v. London Joint-Stock Bank*, 34 Ch. D., 95, 117.

³ L. R., 8 Eq., 36.

⁴ *Pollock's Principles of Contract*, 5th ed., p. 211; *Ex parte Mackenzie*, L. R., 7 Eq., 240; *Webb v. Smith*, 30 Ch. D., 192.

defendant was entitled to set up this defence by way of equitable set-off or deduction from the plaintiff's claim.¹ Similarly the assignee is bound by any condition to which the debt was subject,² and generally by the state of accounts between the assignor and the debtor.³ Thus, for instance, when a mortgage is transferred and the mortgagor is no party to the transfer, the assignee, though not bound to give notice of the transfer, exposes himself by not doing so to the risk of having the mortgage discharged behind his back; for the assignee of a mortgage is in general bound by the state of the account between the mortgagor and the mortgagee, and has to give credit for all the moneys received by his assignor before he gave notice of the assignment to the mortgagor.⁴ But where the mortgagee has acknowledged in the mortgage the receipt of the mortgage-money and the assignee has acted on the faith of that acknowledgment, the mortgagor may be estopped from denying that the sum named was actually received by him.⁵

It is the business of the person taking the assignment to make enquiries, and it is not the duty of the person receiving notice of it to give information as to the defences which are available to the debtor. If however in receiving notice the latter learns that the assignee has been deceived, and that he was advancing money upon a ground which he misunderstood, and notwithstanding this knowledge stands by or fails to give him information,⁶ he may lose the defence which he might otherwise set up against the assignee. Thus a debtor may by his conduct in accepting notice of the assignment be precluded from setting up against an assignee an equity which would have availed against the original obligee.⁷ These cases may also be put on the ground of estoppel, but the representation required to constitute an estoppel must amount to a contract or license of the party making it.⁸ When such a representation has been made and acted upon with regard to securities which are being transferred, the person making it cannot be allowed to defeat the title of those who have taken the securities on the faith of it.⁹

1 3 Ex. Div., 127; see *Kistnasawmy v. Municipal Commissioners, &c.*, 4 Mad., H. C., 120.

2 *Tooth v. Hallett*, L. R., 4 Ch., 242; *Drew v. Josolyne*, 81 Q. B. D., 590.

3 *Ord v. White*, 3 Beav., 357.

4 *Walker v. Jones*, L. R., 1 P. O., 50; *Jones v. Gibbons*, 9 Ves., 410; *In re Lord Southampton's Estate*, 16 Ch. D., p. 186; *Bickerton v. Walker*, 31 Ch. D., 153; *Chinnayya v. Chidambaram*, I. L. R., 2 Mad., p. 214.

5 *Hunter v. Walters*, L. R., 7 Ch., 75; *Goodwin v. Roberts*, 1 App. Cas., 476.

6 *Mangles v. Dixon*, 3 H. L. O., 702.

7 *In re Hercules Insurance Co.*, L. R., 12, Eq., 302.

8 *Clarke v. Hart*, 6 H. L. O., p. 633.

9 *Goodwin v. Roberts*, *supra*.

Although the section does not contain the proviso found in the proposition above cited, it is apprehended that the general rule will be excluded here by circumstances which would exclude its operation in the English Courts. "This is a rule," said Cairns, L.J.,¹ "which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities," namely, the equities existing between the original parties to the contract. Such an intention has been found to be established in many cases of transferable debentures.²

In England the Judicature Act, section 25, expressly excepts assignments by way of charge. It is not clear what cases are brought within the section by the use of the term 'charge,' which are not within the general rule of English law stated at the beginning of this note.

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.

Commentary.

A debt that is treated as a security and made the subject of a mortgage must be dealt with by the secured creditor in the same way as any other security.³ If he recovers the debt he must give credit for the sum realized and pay over any surplus to his assignor. If he fails to get in the money and in consequence of his wilful default or neglect the debt becomes irrecoverable, he may be charged with the loss. A prudent assignee will therefore insist on a clause in the mortgage-deed providing that it shall not be obligatory on him to sue for the debt except as and when he may think proper.⁴ The security cannot be dis severed from the secured debt. The debt and the mortgage pass together on assignment of the one or the other.⁵ Where therefore the mortgagee of certain property, holding promissory notes as a collateral security, had assigned

¹ *Ex parte Asiatic Banking Corporation*, L. R., 2 Ch., 391.

² Pollock's Principles of Contract, 5th ed., p. 214.

³ Compare section 97, and section 176 of the Contract Act.

⁴ Robbins' Law of Mortgage, p. 301.

⁵ See note 5 to section 8.

the mortgage to a third person, he was restrained by injunction from proceeding on the notes, pending a suit instituted by the mortgagor to redeem his property.¹ But if, when the mortgage has been transferred to one person, the payee of the promissory note indorses it to another who takes *bonâ fide* for value, it is no answer to an action on the note by the latter that the payee has received the amount of the debt from the transferee of the mortgage. As between the defendant and the payee the right to sue on the note ceased upon the transfer of the mortgage because he then parted with his interest, he would therefore have been restrained from suing on it for his own benefit. But against the indorsee of the note for value without notice of the facts, the defendant had no such equity and he could not say that the note had been paid.²

In England debts are usually mortgaged by assignment combined with a power-of-attorney, which being an authority coupled with an interest, is irrevocable. It is doubtful whether the mortgage of a debt is an absolute assignment within the meaning of the Judicature Act so as to entitle the assignee to sue in his own name.³

Saving of negotiable instruments.

139. Nothing in this chapter applies to negotiable instruments.

1. Walker v. Jones, L. R., I. P. C., 50; *In re Richards*, 45 Ch. D., 589.

2 Glasscock v. Balls, 24 Q. B. D., 13.

3 Tancred v. Delagoa Bay Co., 23 Q. B. D., 239.

THE SCHEDULE.

(a)—STATUTES.

Year and Chapter.	Subject.	Extent of Repeal.
27 Hen. VIII, c. 10 ...	Uses ...	The whole.
13 Eliz., c. 5 ...	Fraudulent conveyances...	The whole.
27 Eliz., c. 4 ...	Fraudulent conveyances ..	The whole.
4 Wm. & Mary, c. 16 ...	Clandestine mortgages ...	The whole.

(b)—ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and Year.	Subject.	Extent of Repeal.
IX of 1842 ...	Lease and Release ...	The whole.
XXXI of 1854 ...	Modes of conveying land.	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1; in the title, the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII of 1866 ...	Indian Trustee Act ...	Section 31.
IV of 1872 ...	Panjab Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876 ...	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877 ...	Specific Relief ...	In sections 35 and 36, the words "in writing."

(c)—REGULATIONS.

Number and Year.	Subject.	Extent of Repeal.
Bengal Regulation I of 1798.	Conditional Sales ..	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts: interest: mortgagees in possession.	Section 15.

APPENDIX I.

*Sections 6 to 19 of Trustees' and Mortgagees' Powers Act
(Act XXVIII of 1866) referred to in s. 69 of the
Transfer of Property Act.*

POWERS OF MORTGAGEES.

6. Where any principal money is secured or charged by deed on any immoveable property, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely:—

Powers incident to mortgagees.

1st.—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner:

2nd.—A power to appoint or obtain the appointment of a Receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred, shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Receipts for purchase-money sufficient discharges.

8. No such sale as last aforesaid shall be made until after six months'

Notice to be given before sale; but purchaser relieved from inquiry as to circumstances of sale.

notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damnified by any such unauthorized exercise of such power, shall have his remedy in damages against the person or persons selling.

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows:—

Application of purchase-money.

first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and thirdly, in discharge of all the principal monies then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators, or assigns, as the case may be.

10. The person exercising the power of sale hereby conferred shall

Conveyance to the purchaser.

have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein which the person who created the charge had power to dispose of. Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee simple of the property comprised therein in cases where the mortgagor could have disposed of such fee simple at the date of the mortgage.

11. At any time after the power of sale hereby conferred shall have

Owner of charge may call for title-deeds and conveyance of legal estate.

become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, or surrendered to and then were vested in him for all the estate and interest which the person creating the charge had power to dispose of; and where the legal estate shall be outstanding in a Trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a

conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

12. Any person entitled to appoint or obtain the appointment of a Receiver as aforesaid, may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be Receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as Receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit. No person shall be ineligible for the office of Receiver merely because he is an Officer of the High Court.

13. Every Receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his act or defaults unless otherwise provided for in the charge.

14. Every Receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed Receiver, by suit, distress, or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

15. Every Receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a Receiver, and new Receivers may be appointed from time to time.

16. Every Receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.

17. Every Receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge, which is in its nature insurable.

18. Every Receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue and of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any; and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is Receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.

19. The powers and provisions contained in ss. 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

APPENDIX II.

Rules made under the provisions of section 104 of the Transfer of Property Act by the High Court of Bengal¹ and, with the exception of Rules 12, 16, 17 & 18 by the High Court of Madras.²

Application under s. 83. 1. Every application, under s. 83, shall be made by a verified petition, stating the facts.

Payment into Court of costs and expenses under s. 83, or any subsequent section. 2. Unless otherwise ordered, there shall be paid into Court, in addition to the sum deposited under s. 83, or any subsequent section, a sum sufficient to provide for the fees and charges of the Accountant-General and the Bank of Bengal, and for the mortgagee's costs of obtaining payment out of Court; and also when such payment is made under section 83, a further sum to provide for the mortgagee's costs of transferring the property, and causing such transfer to be registered; such costs to be estimated and certified by the Taxing Officer.

Order for payment of money into Court under s. 83. 3. Every order for payment of money into Court, under section 83, shall specify the sums to be paid, and the purpose for which each sum is intended.

Service of notice under s. 83. 4. Unless otherwise ordered, the applicant or his attorney shall serve, or cause to be served, the notice to be given under section 83.

Of notice of payment under any subsequent section. 5. When money is paid into Court under section 86, or under any subsequent section, the person making such payment shall forthwith give written notice thereof to the person or persons on whose account such payment is made.

¹ These rules were published in the Calcutta Gazette, 6th August 1884.

² These rules were published in the Port St. George Gazette Supplement, dated 16th June 1891, p. 29.

6. Every application by a mortgagee to obtain payment of money out of Court shall be by a verified petition.

Application for payment of money out of Court under s. 57 (c).¹

And, when made under section 83, it shall be shown whether the property has been transferred, and [where the applicant was in possession] possession delivered up, free from encumbrance, and whether the transfer has been registered. The documents of title which were held by the applicant, shall also be accounted for.

Or under s. 86 or s. 92.

Or, when made under section 86 or section 92, it shall be shown that the provisions of such section have been complied with.

7. Every application under the last preceding rule shall be on notice to the person by whom, or on whose behalf, the money was paid, or to his attorney, unless the Court shall think fit to dispense with such notice.

8. Unless otherwise ordered, whenever any notice or order is served under the Act or under these rules, an affidavit or affirmation in proof of such service shall be filed as soon as possible thereafter.

Affidavit of service of notice, or order.

9. Where it shall appear that previous to any payment into Court under section 83, or any subsequent section, a sufficient tender was made to and refused by, the mortgagee, he shall not be allowed to obtain payment of the amount deposited in Court to meet his claim, without deduction of the fees and charges of the Accountant-General and the Bank, nor shall be allowed his costs of obtaining such payment. Except as aforesaid, or when otherwise ordered, the mortgagee shall be allowed all costs properly incurred by him.

Costs of mortgage.

Disallowances where tender refused.

10. If through default on the part of the plaintiff it becomes necessary to obtain an enlargement of time under section 87, no interest shall be allowed for the enlarged time.

When interest disallowed.

11. On an application for payment of money out of Court, under section 83, or any subsequent section, by a mortgagee, who has complied with the orders of the Court and the provisions of the Act and of these rules, so far as they relate to him, or apply to his case and has, when

Order for payment of money out of Court, under s. 83, or any subsequent section.

¹ It will be observed that under section 104 the High Court is empowered to make rules for carrying out the provisions of Chapter IV only, and that section 57 occurs in Chapter III.

required so to do, transferred the property and possession, free from encumbrance, and caused such transfer to be registered, and accounted for the documents of title which were held by him, the Court shall make such order or orders as to it shall seem fit for the disposal of the capital sum and interest thereon, and of the fund for costs and expenses.

*12. Every decree for sale under the Act shall direct that, if the proceeds of sale shall not be sufficient to satisfy the decree, the defendant [if the original mortgagor] shall personally [or if the representative in estate of the original mortgagor, shall out of his estate] pay the amount of the deficiency.

Decree for sale
to provide for payment of amount of deficiency.

13. Every final order for foreclosure, under section 87 or section 93, shall direct that possession of the property be given to the mortgagee, except where he is already in possession. It shall also, at the option of the mortgagee, be drawn up with a recital of the decree and the proceedings had thereunder, and with a full description of the property, or without any such recital or description.¹

Final foreclosure order, s. 87 or s. 93.

14. Where immoveable property is sold under section 88, or any subsequent section, the purchaser may, on application to a Judge in Chambers, obtain a certificate of sale as evidence of the title to the property sold to him and may also, at his own costs, obtain a conveyance from the mortgagor.

Conveyance of property sold under s. 88, or any subsequent section.

15. Every enforceable order made under section 83 may be enforced under the provisions of the Code of Civil Procedure, and shall for that purpose be deemed to have been made in a suit instituted under that Code.

Order under sec. 83 how enforced.

*16. Rules 45 and 46 of the rules of the 1st of August 1877 [Rules 431 and 432, Belchambers R. and O., pp. 200, 201,] relating to sales by the Registrar, are hereby repealed.

Rules repealed.

From Rule 50 of the same rules shall be omitted the words "unless otherwise ordered the costs of such application in the case of a person under disability shall be part costs of the sale, and in other cases shall be borne and paid by the defaulting party."

Rules amended.

¹ The order here referred to is described in section 87, as an 'order absolute for foreclosure.'

* This rule has not been adopted by the Madras High Court.

At the end of Rule 58 of the same rules shall be added the words
 "or the grant to him of a certificate of sale."

*17. Rules 387 to 449 [Belchambers R. and O., pp. 189 to 205],
 relating to sales by the Registrar as modified by the
 last preceding rule, and so far as they are applicable,
 shall apply to all sales by the Court under sections
 88 and 89 or 92 and 93.

Rules relating to
 sales by Registrar to
 apply to sales under
 the Act.

*18. The money rules 597a to 641 [Belchambers R. and O.,
 pp. 240 to 253] shall also, so far as they are applica-
 ble, apply to the payment of money into Court, and
 out of Court, under these rules.

Money rules to
 apply to payments
 under these rules.

19. The form set forth in the annexed schedule shall be followed,
 with such variations as the circumstances of each
 case may require.

Form.

NOTICE UNDER SECTION 83.

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL
 ORDINARY ORIGINAL CIVIL JURISDICTION.

To B.

WHEREAS A has, under section 83 of Act IV of 1882, deposited in
 Court Rs. 10,000 as the amount remaining due on the mortgage to you,
 dated the day of 188 , and Rs. 100 for the commission
 and charges of the Accountant-General and the Bank of Bengal, and
 Rs. 500 to provide for such necessary costs and expenses as you may
 incur [and whereas it is alleged that a sufficient tender was previously
 made to you]:—You are hereby informed that the Court, upon being
 satisfied that you have retransferred the property comprised in the said
 mortgage and [where B is in possession] delivered up possession thereof
 to the said A, and have also delivered up to the said A, or deposited in
 Court, or accounted for, all documents in your possession or power, or
 for which you are responsible, relating to the said property, the Court
 will make such order as to it shall seem fit for the payment to you of the
 said sum of Rs. 10,000 [less, where a tender was made, the commission
 and charges of the Accountant-General and the Bank of Bengal] with all
 costs and expenses to which you may be entitled.

Dated this day of, 188 .
Registrar.

* This rule has not been adopted by the Madras High Court.

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An Act to amend the Transfer of Property Act, 1882.

IV of 1882.

WHEREAS it is expedient to amend the Transfer of Property Act, 1882; It is hereby enacted as follows:—

Short title and
commencement.

1. (1) This Act may be called the
Transfer of Property Act, 1900; and

(2) It shall come into force at once.

IV of 1882.

2. In section 3 of the Transfer of Property Act, 1882,

Addition to sec-
tion 3, Act IV, 1882.

after the definition of “attached to the
earth” the following shall be inserted,
namely:—

“Actionable claim” means a claim to any debt, other
than a debt secured by mortgage of immoveable property
or by hypothecation or pledge of moveable property, or to
any beneficial interest in moveable property not in the pos-
session, either actual or constructive, of the claimant, which
the Civil Courts recognize as affording grounds for relief,
whether such debt or beneficial interest be existent, accru-
ing conditional or contingent.”

Amendment of sec-
tion 6, Act IV, 1882.

3. In section 6 of the same Act—

(i) in clause (e) the words “for compensation for a
fraud or for harm illegally caused” shall be omitted; and

(ii) in clause (h) the words “for an illegal purpose”
shall be omitted and instead thereof the words “for an un-
lawful object or consideration within the meaning of section

IX of 1872.

23 of the Indian Contract Act, 1872,” shall be inserted.

Substitution of
new Chapter for
Chapter VIII, Act
IV, 1882.

4. For Chapter VIII of the same Act,
the following Chapter shall be substituted,
namely:—

“CHAPTER. VIII.

“OF TRANSFERS OF ACTIONABLE CLAIMS.

“130. (1) The transfer of an actionable claim shall be
effected only by the execution of an instru-
ment in writing signed by the transferor

Transfer of action-
able claim.

* This Act received the assent of the Governor-General on the 2nd February 1900.

or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.—Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations.

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132.

“131. Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

“ 132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of actionable claim.

Illustrations.

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

“ 133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

“ 134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Mortgaged debt.

“ 135. Every assignee, by endorsement or other writing, of a policy of a marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as in the contract contained in the policy had been made with himself.

Assignment of rights under marine or fire policy of insurance.

“136. No Judge, legal practitioner, or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

“137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation.—The expression ‘mercantile document of title to goods’ includes a bill of lading, dock-warrant, warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.”

5. So much of the Policies of Insurance (Marine and Fire) Assignment Act, 1866, as is v of 1866. repealed, and so much of the Indian Short Titles Act, 1897, as relates thereto, are hereby xiv of 18 repealed.

LAW WORKS

BY

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